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## CONVEYANCER'S NOTEBOOK.

### H.M. LAND REGISTRY.

"The Chief Land Registrar regrets that, owing to the absence of Inland Revenue stamping facilities at Bournemouth, he will no longer be able to have Inland Revenue or the 'Produced' stamps impressed on documents for solicitors as during recent years has been done in an effort to assist in ways not contemplated by the Land Registration Rules, 1925.

"In future, therefore, all applications for registration must be stamped with the appropriate Inland Revenue or 'Produced' stamps as required by rule 83 of the Land Registration Rules, 1925, *before* being forwarded to H.M. Land Registry, Marsham Court, Bournemouth. If not so stamped, the Chief Land Registrar regrets the Registry will have no option but to cancel the accompanying application for registration and to return the documents to the solicitors for the necessary stamping.

H.M. Land Registry,
Marsham Court,
Bournemouth.
November 15, 1940."

The effect of this notice and of the removal of the Registry to Bournemouth should have two effects on registered conveyancing, at least for the time being, but these effects may be permanent. First, the fact that all instruments have to be stamped before delivery to the Registry with Inland Revenue duty and the "Produced" stamps, coupled with delay in the posts, make it essential that official searches on Form 94 should be used. These

official searches give protection to any transfer or other dealing lodged within fourteen days of the date of search. The search, therefore, should be made immediately prior to completion to allow for the time lag between execution of the instrument and lodging with the Registry.

Secondly, the virtual impossibility of personal searches and the disadvantages necessarily attendant upon inspection of Land Certificates should encourage all practitioners to use official copies of the Register in preference to abstracts or copies of the Land Certificate. The cost of an official copy of the Register and filed plan is very small, and, if supplied, renders inspection of the Register or of the Land Certificate unnecessary save in those cases where it may be necessary to inspect some instrument filed at the Registry. These last cases should be very rare. Coupled with an official search dependence upon an official copy should ensure complete accuracy as to the state of the registered title, and only in rare cases where an entry is not completely explanatory will further investigation be necessary with regard to matters appearing on the Register, that is, in respect of interests other than overriding interests.

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*Land certificates destroyed by enemy action.*—" The Chief Land Registrar desires to inform solicitors that in the event of land or charge certificates being destroyed by enemy action application should be made *at once* to the Land Registry for an office copy of the register and filed plan or relevant section of the General Map.

Under section 113 of the L. R. Act, 1925, such copies are admissible in evidence to the same extent as the original land or charge certificate. In addition they fulfil the very important function of affording a complete duplicate of the register should the registers themselves be destroyed.

The normal fee is 1s. 6d. for a photographic copy of the register and 1s. for a copy of the filed plan or section of the General Map.

If an office copy of the register and plan is obtained, the replacement of the destroyed land or charge certificate can safely be left over to a convenient season or until a dealing is contemplated.

Solicitors may be confident that the Registry will facilitate and expedite the issue of new land or charge certificates for those destroyed by enemy action in every way within its power.

September 20, 1940."

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*Land Charges Register—priority notices—searches.*—By the Land Charges Rules, 1940, which came into operation on the 25th day of November, 1940 (S. R. & O., 1940, No. 1998), the periods appropriate to priority notices and official searches under the Land

Charges Act, 1925, as amended by the Law of Property (Amendment) Act, 1926, are extended. In each case the period for protection was two days. By the new Rules the period in each case has been extended to fourteen days. Hence an official search made within fourteen days of completion will obtain protection for a purchaser. The purpose is to overcome delay in dealings by post, because it will be remembered that the date of the search is that marked by the Registry and not the date of receipt by the solicitors for the purchaser.

The desirability of lodging a priority for all matters which required to be registered as a land charge (except perhaps restrictive covenants which are not likely to be affected) becomes more apparent in these days when registration may be delayed. Consequently, and particularly in the case of puisne mortgages, the incumbrancer's solicitor will avail himself of the extended time for filing priority notices.

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*Gifts free of death duties.*—The case of *Re Owers*, [1940] 4 All E. R. 225, is of considerable importance where estate duty and legacy duty in respect of legacies are to be paid out of the residuary fund. It is hoped to deal with this case, with precedents of appropriate clauses, in the next number.

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## DEPOSITS, PART PAYMENTS AND PART PERFORMANCE.

By E. O. Walford, LL.D., Solicitor.

### Distinction between Deposits and Payments on Account of Purchase Price.

Where a payment is made by way of deposit there can be no doubt that it is absolutely forfeited if the purchaser repudiates the contract or makes default in complying with it, subject to the power conferred on the Court by section 49 of the L. P. Act, 1925, of ordering its return (*Howe* v. *Smith* (1884), 27 Ch. D. 89; *Soper* v. *Arnold* (1889), 14 App. Cas., at p. 435).

If, however, the payment is merely a payment on account of the purchase price, *i.e.*, in part payment of the purchase price, the vendor will not necessarily be entitled to retain it. The vendor's right in that case is to recover damages (*Dies and Another* v. *British, etc., Finance Corporation, Ltd.*, [1939] 1 K. B. 724). The measure of damages is well settled. If the vendor has not

resold—and he is not compelled to do so—the amount which the vendor can recover is the difference between the purchase price of the property plus the expenses of the original sale (*Essex* v. *Daniell* (1875), L. R. 10 C. P. 538) and its value at the date when the action is brought (and not the amount of the purchase price): *Keck* v. *Faber* (1915), 60 S. J. 253; *Watkins* v. *Watkins* (1849), 12 L. T. (o.s.) 353; *Laird* v. *Pim* (1841), 7 M. & W. 474. Credit must be given for any payment on account of the purchase price. It will be appreciated that in many cases there will be no material difference in value in the property within a short period after the original sale; but if the price which was to be paid by the purchaser was a very high one it may of course be possible to satisfy the Court by the evidence of surveyors or estate agents. Moreover, it has been laid down that the vendor is entitled to recover this measure of damages on the basis of a realisation within a reasonable time after the breach. In other words the vendor is not bound to wait and nurse the property so as to obtain a better price, as might be done by a speculative builder (*Keck* v. *Faber*, *supra*).

If the vendor (retaining the property) fails to show that the difference between the purchase price (plus the expenses of the sale) and the value of the property when the action is commenced is less than the payment on account of the purchase price he can prove no damage, except (possibly) the sale expenses (*a*).

The other possibility is that the vendor may resell the property. In that case the measure of damages is the loss on the resale (including the expenses of resale) and any payments on account of the purchase price must be brought into account: *Ockenden* v. *Henly* (1858), E. B. & E. 485. In that event the vendor clearly cannot recover the expenses of the original sale, for these would have been incurred even if the sale had been completed. But see and cf. *Re Daniel*, [1917] 2 Ch. 405, and *Wallington* v. *Townsend*, [1939] 2 All E. R. 225 (purchaser's claim on vendor's default). A provision in a contract purporting to enable the vendor to retain payments made on account of the purchase in the event of default by the purchaser is ineffective; or rather it is not fully effective. It does not take effect according to its tenor. Thus, if the purchase price is to be paid by instalments, and the contract provides that in the event of default in payment of any of the instalments all instalments paid are to be forfeited, the Court will treat such a provision as a penal one, and will relieve against it. If the parties have agreed that time shall be of the essence of the agreement for sale the Court cannot relieve

(*a*) See and cf. *Wallington* v. *Townsend*, [1939] 2 All E. R. 225 (*purchaser's claim*).

against the rescission by the vendor of the contract but can insist that the vendor shall have only proper damages and not necessarily the total of the instalments : *Re Dagenham (Thames) Dock Co.* (1873), 8 Ch. App. 1022; *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319.

If it is stipulated that upon default by the purchaser in payment of any instalment that the vendor may rescind the contract and that payments already made shall be forfeited, the effect of such a stipulation may depend upon whether time is declared to be of the essence of the contract.

If time is not of the essence of the contract it is necessary for the vendor by giving reasonable notice to make it so before operating under the clause. If time is declared to be of the essence of the contract it is unnecessary to give any notice, but on the other hand the vendor must be careful not to prejudice his position by giving time to the purchaser.

These propositions are best illustrated by three leading cases :—

(1) *Kilmer* v. *British Columbia Orchard Lands, Ltd.*, [1913] A. C. 319.—Purchase price payable by instalments. Purchaser paid all instalments except the final one. By the conditions all instalments paid were forfeited and the contract avoided in case of default in the payment of any instalment, time being of the essence of the contract.

The Court not only relieved the purchaser against the forfeiture of the instalments, but also enforced specific performance by the vendor on payment by the purchaser of the final instalment, notwithstanding the provision making time of the essence. This case was explained by Lord Haldane in *Steedman* v. *Drinkle*, [1916] A. C., at p. 280. He stated that as time was declared to be of the essence of the agreement specific performance was decreed only because their Lordships were of the opinion that the stipulation as to time had been waived, the date of the payment of the unpaid instalment having been extended by the vendors. The fact that time was of the essence would not, however, have prevented the Court from declaring that the forfeiture of the instalments paid was a penalty in respect of which relief could be granted (on the footing above indicated).

(2) *Steedman* v. *Drinkle*, [1916] A. C. 270.—Agreement for sale of land at $16,000, of which $1,000 was paid on exchange of contracts, the balance to be paid by six yearly instalments. The contract contained a similar forfeiture and cancellation clause. The purchaser made default in

the payment of an instalment of the purchase money and the vendor purported to rescind the agreement and claimed forfeiture of the money already paid by the purchaser. As was subsequently pointed out in *Brickles* v. *Snell*, [1916] A. C. 599, the vendor did not give any further time for payment but took advantage of the default immediately and cancelled the contract. The Board decided that as time was of the essence specific performance could not be decreed but held that the forfeiture of the money paid was a penalty from which relief might be granted on proper terms.

It will be noted that in neither of these two cases was the first payment by way of deposit.

(3) *Mayson* v. *Clouet*, [1924] A. C. 980.—Contract for sale of land under which a deposit and two instalments on account of the purchase price were paid but the purchaser made default in paying the balance of the purchase price on the date fixed for completion. The vendor lawfully rescinded the contract, and the purchaser claimed the return of the two instalments. The contract provided only for the forfeiture of the deposit and the resale of the land if the purchaser made default. It was held that the instalments must be returned to the purchaser. It is deducible from the authorities above set out that even if the contract had provided for forfeiture of the instalments in addition to the deposit the vendor would not necessarily have been entitled to retain them. He could have retained only such an amount as was equal to the pecuniary loss suffered by him in excess of the deposited sum. For the vendor, when claiming damages, must bring into account the deposit: *Shuttleworth* v. *Clews*, [1910] 1 Ch. 176; *Ockenden* v. *Henley* (1858), E. B. & E. 485.

The case of *Mussen* v. *Van Diemen's Land Co.*, [1938] Ch. 253, is to be contrasted with *Mayson's Case*; for in *Mussen's Case* there was really a purchase of land in instalments, parts of the land being conveyed to the purchaser as he made certain payments, so that there was no question of the vendor retaining the whole of the original land.

Can the vendor overcome the difficulty exemplified by *Mayson* v. *Clouet*, *supra*, by making provision in the contract for a series of "deposits"? Thus, the contract might conceivably provide for the payment as deposits of a series of sums by (say) five equal monthly instalments, the balance of the purchase price (being an

amount equal to the fixed instalment) to be paid six months after the date of the contract, any sums paid by way of deposit to be forfeited if the purchaser makes default in completing the purchase.

There are various aspects of this problem. Whilst there appears to be no case in which the Court has refused to allow the vendor to retain the whole of the deposit upon the ground that the actual damage suffered by the vendor is less than the amount of the deposit, the Court now has power under section 49 (2) of the L. P. Act, 1925, where it refuses to grant specific performance or in any action for the return of the deposit, to order its return.

Although the payments are expressed to be by way of deposit there is little difference *in substance* between such a contract and a contract for the payment of an agreed sum by way of deposit on the exchange of contracts the balance of the purchase price to be paid by instalments. Normally a deposit is a sum paid on exchange of contracts. If the vendor is at liberty to stipulate for the payment of a further deposit or deposits after exchange, where is the Court to draw the line so as to be in a position to say that any further sums paid beyond a certain amount must be treated as payments made solely on account of the purchase price and not as a further deposit?

Subject to the remarks below there would appear to be two possible methods by which the Court may prevent the forfeiture clause from operating according to its tenour.

(1) By deciding that all sums to be paid by the purchaser after the date of the contract are not deposits but payments on account of the purchase price. The object of a deposit is to furnish a guarantee or "earnest" on the entry into the contract. Accordingly the Court may decide that subsequent payments are not normally by way of guarantee or earnest but are merely payments on account of the purchase price, even if called "deposits" and expressed to be forfeitable as such.

(2) By exercising its jurisdiction under section 49 (2) of the L. P. Act, 1925, and ordering the return of the sums expressed to be paid as deposit, but awarding to the vendor fair and proper damages (in accordance with the rule above indicated). This course would, however, present very substantial difficulties. Thus, if the purchase price is £2,000 and a deposit of £200 is paid on the exchange of contracts, there seems to be no doubt (on the authorities) that the vendor may retain the deposit in full even if it could be shown that the actual loss suffered by the vendor was less than £400. Assume, however, that

the contract is for payment of a deposit on exchange of contracts of £200, a further three deposits of £200 each to be paid monthly, and the balance of the purchase price to be paid four months after the date of the contract. The return of all sums paid by way of deposit and the award of damages equal to the actual loss (if any) might produce a somewhat inequitable result, for if the vendor could not prove that his actual loss amounted to £200 the following illogical result would ensue :—

(a) Payment of £200 as deposit on exchange. Vendor may retain the deposit in full if the purchaser makes default.

(b) As in (a), with a provision for the payment of three further deposits at monthly intervals. Vendor cannot retain even the first deposit of £200.

It is submitted that this result is so illogical that the Courts could not adopt such a course.

Again, it may then be contended that if the Court is faced with a case in which forfeiture of a series of deposits is claimed, it must either follow the course indicated in paragraph (1) above, or must accept the position that where the purchaser chooses to agree that sums paid by him shall be treated as a deposit he must be deemed to accept the consequences which flow from the payment of moneys by way of deposit. It is suggested that the Court is not forced to adopt such a view, but may reject the label of "deposit" in the same way that it may reject the label of "liquidated damages" in cases where the so-called damages are in fact a penalty. It is not denied that a true deposit (*i.e.*, something in fact deposited, or agreed to be deposited, to bind the bargain at the moment when the bargain is made) may be forfeited in full even though it might be shown that the loss sustained by the vendor was less than the amount of the deposit. Indeed, if the parties agree that the amount of the deposit shall be forfeited as liquidated damages all the decided cases go to show that the Court will permit the vendor to retain the deposit in full without inquiring whether the actual loss is equal to the amount of the deposit : *Hinton* v. *Sparkes* (1868), L. R. 3 C. P. 161. But in these cases the deposit was a true deposit paid to bind the bargain. A series of sums to be paid at intervals following the striking of the bargain, and together constituting the purchase price, or even the major part of it, can hardly be held by the Court to be deposits, if in truth they are merely payments on account of the purchase price. The point is by no means free from doubt but it is submitted that the Court

is entitled to consider the circumstances and to decide whether the "label" of deposit is correct or whether the payments are in fact simply payments on account of the purchase price.

### Liquidated Damages or Penalty?

If instead of providing that the deposit shall be forfeited and that any deficiency on a resale (after giving credit for the deposit) shall be made good to the vendor, the contract provides that upon default by the purchaser a certain amount shall be paid as liquidated damages, the Court will not necessarily accept the amount so agreed upon as the amount recoverable, but will consider whether that amount may properly be regarded as a genuine pre-estimate of the probable damages. If it is excessive then the Court will regard it as a penalty and will relieve against it: *Dunlop Pneumatic Tyre Co.* v. *New Garage, etc., Co.*, [1915] A. C., at pp. 86 and 87. An agreed amount may be liquidated damages even though it is very difficult to form an exact pre-estimate of the loss which is likely to flow from the breach of the contract, *ibid.* It must, however, be a penalty if it exceeds the maximum loss which could possibly result from a breach of the contract: *Clydebank Engineering Co.* v. *Casteneda*, [1905] A. C., p. 10. The fact that a sum agreed to be paid as liquidated damages is found to be a penal sum will not, however, prevent the complainant from recovering the proper measure of damages: *Kemble* v. *Farren* (1829), 6 Bing. 141. Indeed there is substantial authority for suggesting that in such cases the vendor has the option of suing for the fixed sum (in which case he will recover the true measure of damages up to but not exceeding the amount of the fixed sum), or of ignoring the fixed sum and suing for damages, in which case he may recover a sum in excess of the fixed sum: *Winter* v. *Trimmer* (1762), 1 W. Bl. 395; *Harrison* v. *Wright* (1811), 13 East 343; *General Accident Assurance Co.* v. *Noel*, [1902] 1 K. B. 377; *Diestal* v. *Stevenson*, [1906] 2 K. B. 345; *Wall* v. *Rederiaktiebolaget Luggude*, [1915] 3 K. B. 66, at p. 72; *Watts, Watts & Co.* v. *Mitsui & Co.*, [1917] A. C. 227, at p. 245. This question does not, however, appear to be settled. It was again raised in a recent case where there was a contract for the erection of a certain plant. The contract consisted partly of printed conditions and partly of additional terms which it was necessary to read with the printed conditions, one of which stated that no liability would be accepted for failure to keep to the dates given. The additional terms included a provision for payment of a sum of £20 for every week during which the contractors were in default. The actual damages were in excess of this amount. Lord Atkinson, delivering judgment, con-

sidered that this latter provision was a compromise, and made it clear that he was not deciding what would be the position if this provision were a penalty. He left open the question whether where a penalty is less than the actual damages there is any objection to suing on it, or, in a suitable case, ignoring it and suing for damages. He pointed out that in the case under consideration the result of ignoring the penalty might mean that under the printed condition there would be no compensation at all: *Cellulose Acetate Silk Co.* v. *Widnes Foundry (1925), Ltd.*, [1933] A. C. 20.

### PART PERFORMANCE AS AFFECTING THE DEPOSIT.

By section 40 of the Law of Property Act, 1925 (replacing section 4 of the Statute of Frauds), it is enacted as follows:—

Section 40.—(1) *No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.*

(2) *This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the Court.*

It will be seen that the only bearing which this section has upon part performance is that it preserves in force all decisions founded upon the doctrine of part performance, and does not give statutory force to that doctrine or set up any standard by which it is to be determined whether any particular acts are so clearly referable to a contract as to bring into operation the doctrine of part performance.

It is, of course, possible that after the deposit has been paid there may be acts of part performance *by the vendor as the party seeking to enforce the contract* sufficient to prevent the purchaser from refusing to complete the purchase. If this happens it is clear that even if there is no memorandum of the contract the purchaser cannot recover the deposit. The only question is: what acts will constitute part performance in the sense indicated in section 40 (2) of the L. P. Act, 1925? It is not practicable here to consider the doctrine of part performance in detail, but two excerpts from judgments may be given as indicating the nature of the acts which must be proved. The act "must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be sufficient of itself and without any other information or evidence to satisfy a Court from the circumstances it has created

and the relations it has formed that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced": *per* Lord O'Hagan in *Maddison* v. *Alderson* (1883), 8 App. Cas. 467.

Again, where £100 was paid on account of the purchase price, Lord Cowper said: "A parol agreement . . . cannot be good within the statute by giving money in earnest: for there must be something more than a bare payment of money on the one part to induce the Court to decree a performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part as, beginning to build or letting the other into possession, etc.": *Pengall* v. *Ross* (1709), 2 Eq. Cas. Abr. 46; and see *Buckmaster* v. *Harrop* (1802), 7 Ves. 341, where it is pointed out that the ground on which the Court acts is fraud in refusing to perform after performance by the other party. The *dictum* of Lord Hardwicke in *Lacon* v. *Mertins* (1743), 3 Atk. 1, that the paying of money has always been held to be a part performance, does not appear to be justifiable, and cannot be regarded as stating the law either according to earlier or more modern decisions. See *Anon.* (1680), 1 Freem. K. B. 486; *Seagood* v. *Meale* (1721), 2 Eq. Cas. Abr. 49. In *Main* v. *Melbourn* (1799), 4 Ves. 720, it was said that payment of a *substantial* part of the purchase money would take the case out of the statute; but this was denied in *Watt* v. *Evans* (1834), 4 Y. & C. Ex. App. 579, and the case of *Hughes* v. *Morris* (1852), 2 De G. M. & G. 349, may be taken as settling the law. There it was laid down that even payment of the whole of the purchase price would not take the case out of the statute. When considering whether acts of part performance are such as to render the contract enforceable, it must not be forgotten that however clearly the so-called acts of part performance may appear to indicate the existence of a contract they cannot themselves take the place of a contract. There must be both a complete verbal contract and acts of performance so clearly referable to that contract as to remove any doubt that such acts were done because of the existence of that contract, and not because it was anticipated that a contract would be entered into in certain terms: *Thynne* v. *Glengall* (1848), 2 H. L. C. 131, 158; *Reynolds* v. *Waring*, You. 346; *Price* v. *Griffith*, 1 D. M. & G. 80; *Price* v. *Salusbury*, 32 Beav. 446, 461; *Rawlinson* v. *Ames*, [1925] Ch. 96.

If, however, the doctrine of part performance does apply, and the contract is one which it is proper to enforce by specific performance it is then clear that the deposit can be retained by the vendor

if the purchaser refuses to proceed, or recovered by the purchaser if the vendor is the party so refusing.

### Where no Sufficient Memorandum and no Part Performance.

If there is no sufficient memorandum and no sufficient part performance to render the contract enforceable can the vendor retain the deposit?

(a) *If the vendor refuses to proceed.*

The vendor may be the party refusing to carry out the bargain. If so, he cannot retain the deposit and must return it if the purchaser claims it as money had and received to his use: *Gosbell* v. *Archer* (1835), 2 Ad. & El. 500.

(b) *If the purchaser refuses to proceed.*

Although a verbal contract for sale may be unenforceable it is not a nullity. Thus, A verbally agrees to sell land to B, and then agrees in writing to sell it to C. If A conveys it to B pursuant to the verbal contract, C cannot require B to convey it to him even if B knows of the written agreement: *Dawson* v. *Ellis* (1820), 1 Jac. & W. 524. If the verbal contract were a nullity, B, not having been in the position of a purchaser for value, without notice, of the legal estate, could not therefore have *maintained* the right to retain the legal estate: *Mumford* v. *Stohwasser* (1884), L. R. 18 Eq. 556; *Taylor* v. *London & County Bank*, [1901] 2 Ch. 231.

A purchaser who refuses to proceed with the purchase on the ground that there is no sufficient memorandum cannot recover the deposit. There have been conflicting *dicta* on this question; but the law now appears to be settled. In *Casson* v. *Roberts* (1862), 31 Beav. 613, it was held that the purchaser could do so, but this case was distinguished in *Thomas* v. *Brown* (1876), 1 Q. B. D. 714, where, after examining the abstract and forwarding requisitions "without prejudice to any question which may arise as to the contract for purchase", the purchaser sought to recover his deposit on the ground that the memorandum was not sufficient. It was held that the purchaser having proceeded so far, knowing of the insufficiency of the memorandum, could not recover the deposit. The *dicta* of the Judges went further, and threw doubt on *Casson* v. *Roberts*, *supra*. In the later case of *Monnickendam* v. *Leanse* (1923), 39 T. L. R. 445, it was held that if the purchaser repudiates the transaction on the ground that there is no sufficient memorandum in writing he cannot recover the deposit. Provided that there is sufficient evidence of a definite verbal agreement of sale and purchase it is, no doubt, proper that the purchaser who has paid a deposit (which is clearly

something given in "earnest" or token of good faith) should forfeit it if he makes default. Further, if there is a complete verbal contract and the purchaser having drawn a cheque in favour of the vendor for part of the purchase price (and not as a deposit), refuses to proceed and stops the cheque, the vendor can recover on the cheque. The fact that the contract is unenforceable owing to the lack of a sufficient memorandum does not affect the question: *Jones* v. *Jones*, 6 M. & W. 84; *Low* v. *Fry* (1935), 152 L. T. 585. The last case is the more remarkable, as the cheque was not merely for the amount of the normal deposit but for more than half the purchase price of £800. du Parcq, J., pointed out that the vendor was prepared to give an undertaking to carry out the contract and observed that there was no provision for forfeiture, and if the vendor had elected to treat the contract as rescinded and accepted the defendant's repudiation he would not be entitled to recover.

Cases where the agreement is unenforceable because there is no sufficient memorandum must be distinguished both from those in which there is no complete oral agreement and from cases in which there is an agreement subject to some condition, or a so-called agreement subject to contract. As to oral agreements it has been observed by Maugham, J., that "the onus of proving an unconditional verbal acceptance of an offer in writing to sell real estate ought to be regarded as a heavy one, to be discharged only by clear evidence of the fact. In a case of reasonable doubt the Court must take the view that the verbal acceptance has not been established": *Watson* v. *Davies*, [1931] 1 Ch. 455, 468. In such cases the deposit is clearly recoverable by the purchaser.

An agreement subject to a condition may be a true agreement or may be a mere nullity. Thus, an agreement to purchase "subject to surveyor's report" is no agreement: *Marks* v. *Board* (1930), 46 T. L. R. 424. An agreement to purchase subject to approval of the title by the purchaser's solicitor is an agreement in law, but conditional on such approval, which must not, however, be refused on mere caprice. It has been suggested that such a condition merely means that the vendor must deduce to the purchaser's solicitor a good title. See *Curtis Moffat, Ltd.* v. *Wheeler*, [1929] 2 Ch. 224; and cf. *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.

If there is no agreement the deposit must be recoverable: cf. *Chillingworth* v. *Esche*, [1924] 1 Ch. 97.

### Agreement Conditional on Approval of Title.

If there is a written agreement conditional upon the approval of the title, then one of three things may happen:—

(a) The purchaser's solicitor may approve the title. Thereafter the contract is unconditional. The purchaser cannot recover his deposit if he will not proceed : see, *e.g.*, *Soper* v. *Arnold*, 14 App. Cas., at p. 433.

(b) The purchaser's solicitor may refuse to approve the title because it is defective. In that case there can be no effective agreement, and any deposit paid is recoverable : *Chillingworth* v. *Esche*, [1924] 1 Ch. 97.

(c) The purchaser's solicitor may refuse from mere caprice to approve the title. It would seem that the Court could then declare the contract to be enforceable (*Curtis Moffat, Ltd.* v. *Wheeler*, [1929] 2 Ch. 224), in which case it is clear that the deposit could not be recovered by the purchaser.

### Specific Performance and Forfeiture of Deposit.

The recent case of *Public Trustee* v. *Pearlberg*, [1940] 1 All E. R. 270, illustrates the rule that if the vendor claims specific performance he cannot execute a *volte face* and forfeit the deposit without first discontinuing the action for specific performance.

### Courts (Emergency Powers) Acts.

Leave of the Court is necessary before a vendor can proceed to exercise any remedy which is available to him by way of the taking of possession of any property or of the forfeiture of any deposit (C. (E. P.) Act, 1939, s. 1 (2) (a)), in cases where the contract was made before September 2, 1939. By section 1 (3) of the same Act as amended by the C. (E. P.) Amendment Act, 1940, (except where the judgment or order is made in proceedings for enforcing a contract made on or after September 2, 1939) no judgment or order (whenever made) for (*inter alia*) " the delivery of any property other than land by reason of a default in the payment of money " can be enforced (by execution or otherwise) except with the leave of the Court. In *Broadstairs Picture House* v. *Littman*, [1940] 3 All E. R. 419, the vendors obtained an order for specific performance, but default continued. They then obtained an order for rescission (in lieu of specific performance), possession, and forfeiture of the deposit (*a*).

(*a*) The doctrine of *Warde* v. *Dixon* (1858), 28 L. J. Ch. 315, reaffirmed in the *Pearlberg Case*, *supra*, did not apply because the specific performance action was completed, the order for rescission and forfeiture of the deposit being a recognition of the purchaser's contempt of Court : *Hall* v. *Burnell*, [1911] 2 Ch. 511. This is really an exception from the rule " that a person electing to affirm a contract cannot later rescind it : see Williams, Vendor & Purchaser, 4th ed., p. 1063, note (*h*).

At the time when the *Broadstairs Case* was decided no leave was necessary to enforce an order for delivery of property other than land, the C. (E. P.) Amendment Act of 1940, *supra*, not having been passed. Bennett, J., granting the order for rescission, also declared that the vendors could give a discharge to the stakeholders for the deposit.

Since the passing of the 1940 Act, Morton, J., has held (July 16, 1940) that it is unnecessary for the vendor, armed with an order for rescission and forfeiture of the deposit, to obtain the leave of the Court to enable him to collect a deposit held by stakeholders (*Times* newspaper, July 17, 1940). It appears that the Act of 1940 (which as stated above, rendered it necessary to obtain the leave of the Court before enforcing an order for the delivery of property other than land by reason of a default in payment of money), was not referred to. Bennett, J., had already held in the *Broadstairs Case* that section 1 (1) of the Act of 1939 did not apply for the very reason that it only applied to the payment or recovery of a sum of money. It seems difficult to suppose an order for the delivery of a forfeited deposit is not an order for the delivery of property other than land, if we assume—as we must—that it is not an order for the payment or recovery of a sum of money. It is disappointing that the later case (to which no name is given by *The Times*) has not been more fully reported, particularly as it is difficult to understand. However, it would seem that there could be but few cases in which the Court would refuse leave to the vendor to collect the deposit in such circumstances.

Since the unreported case last mentioned there has been reported a further case in which this point was touched upon but not decided. A vendor had given notice requiring the purchaser to make good his default, and stating that the deposit would be forfeited if the notice were not complied with within fourteen days. Morton, J., held that this was not the exercise of a "remedy by way of forfeiture of a deposit" but was giving a notice under which the purchaser had an alternative. He might find the money to complete the purchase, but if he did not do so the contract, under its terms, would be null and void and the deposit forfeited, the forfeiture arising out of the purchaser's failure "without any intervening act" of the vendor: *O'Hara* v. *Lipman* (1940), 57 T. L. R. 67; W. N. 337. The question whether the vendor was entitled to *deal with* the deposit without making an application under the C. (E. P.) Act was, however, expressly left open for future argument.

# A SHORT INDEX TO EMERGENCY REGULATIONS.

This is intended as a guide to Acts and Regulations affecting property which have been issued since the publication of the article on the Defence Regulations on pp. 65 to 70 of Volume 4 of *The Conveyancer and Property Lawyer.*

## AGISTMENT OF LIVESTOCK.

Regulation 62 BA, added by 1940 No. 1217 and 1940 No. 1602, empower the Minister or the War Agricultural Executive Committee to give directions to the owner or other person in charge of livestock to deliver it for agistment to the occupier of any other specified land, and to the occupier of that other land requiring him to agist it.

## AGRICULTURE.

1940 No. 563 substitutes a new paragraph 1 of Regulation 62 (see 4 Conv. p. 68) providing that the Minister may give directions by order, or by notice served upon the person by whom the directions are to be complied with.

Regulation 62 (5A) added by 1940 No. 1611 provides that the Minister may stop up and plough any public, private or customary way, not being a carriage or cart way, in pursuance of a direction given under paragraph 1, subject to conditions securing that all rights shall be restored when the paragraph ceases to be in force and affording in the meanwhile necessary facilities for those entitled to use the way.

Agriculture (Miscellaneous War Provisions) Act, 1940 (c. 14), includes (sections 14—22) provisions for land drainage and is to be construed as one with the Land Drainage Act, 1930.

A new section 15 (1) is substituted by 1940 c. 50. See also 1940 No. 1134.

Section 23 contains provisions as to requisitioned land.

Section 26 excludes certain holdings from the Agricultural Holdings Act.

Agriculture (Miscellaneous Provisions, No. 2) Act, 1940 (c. 50) deals with improvement of grass-ways over fen lands (section 2), restriction of remedies for recovery of drainage rates (section 3), recovery of expenses of making good default in compliance with Defence Regulations in relation to agricultural land (section 6), etc.

Cultivation of Lands Order (1939 No. 1078) regulates the powers of the War Agricultural Executive Committees to take possession of land or requisition chattels. Where any person has failed to comply with any directions to do any work on any land the War Agricultural Executive Committee may enter on the land and do the work (1940 No. 1197).

*See also* ALLOTMENTS; PARKS.

## AIR RAID PRECAUTIONS.

A.R.P. (Compulsory Purchase) Provisional Regulations, 1939, empower certain local authorities to acquire or hire land.

**ALLOTMENTS.**

Cultivation of Lands (Allotments) Order (1939 No. 1316) delegates the powers of the Minister under Regulation 51 to the London County Council, borough councils and urban district councils and regulates their powers.

1939 No. 1838 authorises local authorities to adapt or let their land for allotments.

Regulation 62A, added by 1939 No. 1838 and amended by 1940 No. 1611, empowers local authorities to let land for allotments, etc. At expiration of the regulation the tenancy will cease, subject to compensation.

**BILLETING.**

Defence (Billeting Tribunals) Rules (1939 No. 986), for the purpose of hearing complaints, have been made under Regulation 22 (9) of the Defence (General) Regulations, 1939.

**BUILDING.**

Regulation 56A, added by 1940 No. 1678, forbids private building or constructional operations other than those authorised thereby.

**BUILDING SOCIETIES.**

1940 No. 1137 regulates the repayment or withdrawal of shares or deposits in such societies.

Societies (Miscellaneous Provisions) Act, 1940, c. 19, adapts the administration of building and other societies to war conditions.

**CHARITIES.**

War Charities Act, 1940 (c. 31), repeals the War Charities Act, 1916.

**COMPANIES.**

Regulation 2 of Defence (Companies) Regulations, 1940 No. 1213, provides for the delegation of the functions of a liquidator engaged in war service.

Regulation 3, amended by 1940 No. 1687, varies the provisions of section 110 of the Companies Act, 1929, in regard to annual returns.

**COMPENSATION (DEFENCE) ACT, 1939.**

1940 No. 107 provides that compensation shall carry interest until payment at 2 per cent. per annum.

**Notice of claim.**—1939 No. 1296 prescribes forms to be used. In cases of dispute see the General Tribunal Rules, 1939 No. 1784.

**ENTRY AND INSPECTION OF LAND.**

Regulation 85 (see 4 Conv. p. 67) is amended by 1940 No. 384. Any member of H.M. Forces in the course of duty or any person authorised by a competent authority may enter on any land and inspect the land and any article thereon.

**EVACUATED AREAS.**

Defence (Evacuated Areas) Regulations (1940 No. 1209) provide for relief in respect of rent, rates and other local debts, the preservation

of property and disposal of goods, and extend the Courts (Emergency Powers) Act, 1939. See article on pp. 47—52, *ante*.

**GAME AND PESTS.**

1940 No. 382 substitutes a new Regulation for Regulation 63 of the Defence (General) Regulations, 1939. It provides that the Minister may require by Order the destruction of any species of vermin or pest, including hares, rabbits or any specified bird, or deer. If the requirements of the Order have not been complied with within the prescribed time by the person having the right to kill, the Minister may authorise any person or class of persons to carry out the Order.

Orders have been made relating to rabbits (1940 No. 431), rats (1940 Nos. 866 and 1557), rooks (1940 No. 585), wood-pigeons (1940 No. 967), deer (1940 No. 966).

In certain specified areas any authorised person may take or destroy at any time peregrine falcons or their eggs (1940 No. 1164).

No land to which Regulation 62 applies shall be used for the hatching or rearing of pheasants except under licence by the Minister of Agriculture and Fisheries (1940 No. 1128).

**HOUSES.**

If additional accommodation is required for agricultural workers the council of a county district can repair and use as a temporary war-time measure houses condemned under section 155 (3) of the Housing Act, 1936 (Regulation 68A, 1940 No. 1134).

Regulation 68AA contains similar provisions in regard to persons rendered homeless by enemy action (1940 No. 1684).

**LAND DRAINAGE.** *See* Agriculture.

**LANDLORD AND TENANT.**

The Courts (Emergency Powers) Amendment Act, 1940 (c. 37) amends the Act of 1939 as respects defaulting tenants or mortgagors, hire-purchase agreements, etc. See article on pp. 4—23, *ante*.

*See also* Evacuated Areas; Pigs, Hens and Rabbits.

**MANORIAL INCIDENTS.**

Postponement of Enactments (Miscellaneous Provisions) Act, 1939, imposes a moratorium on application for the determination of the amount of compensation to be paid.

**NUISANCES.**

Regulation 54A (1940 No. 697) gives the competent authority power to permit nuisances if necessary subject to certain conditions. See also 54AA (1940 No. 1032).

**PARKS, SPORTS AND RECREATION GROUNDS, AND RACE COURSES** are included under Regulation 62 by 1940 No. 1016 (see 4 Conv. p. 68, and Agriculture, *supra*).

**PIGS, HENS AND RABBITS** may be kept by an occupier of premises notwithstanding any agreement in lease or tenancy or covenant, etc., or any restrictive enactment and the necessary buildings, etc., erected (1940 No. 1016, para. 7).

**POWERS OF ATTORNEY.**

Evidence and Powers of Attorney Act, 1940 (c. 28), deals *inter alia* with the execution of powers of attorney abroad and empowers certain officers in the Navy, Army and Air Force to administer oaths and take affidavits. See the Armed Forces (Administration of Oaths) Order, 1940 No. 1224.

**PUBLIC UTILITY UNDERTAKINGS.**

Special Enactments (Extension of Time) Act, 1940 (c. 16), provides for extensions of time in relation to duties, etc., conferred by private or local Acts and in relation to powers exercisable in relation to public utility undertakings.

**RATING.**

Rating Act, 1940 (c. 12), postpones the making of new valuation lists for rating purposes in England and for purposes connected therewith.

Remission of Rates (London) Act, 1940 (c. 32), extends section 2 of the Rating and Valuation Act, 1925, to the administrative county of London.

**REQUISITIONING LAND.**

An additional provision to Regulation 51 (4 Conv. p. 66) gives power to the competent authority to authorise the persons carrying on any business or undertaking to occupy and use the land for the purposes of that business or undertaking on such terms as may be agreed upon between them and the competent authority (1940 No. 828).

*See also* AGRICULTURE, *supra*.

**REQUISITIONING PERSONAL SERVICES AND PROPERTY.**

Emergency Powers (Defence) Act, 1940 (c. 20), gives power by Order in Council to make Defence Regulations making provision for requiring persons to place themselves, their services and their property at the disposal of His Majesty. The ground on which these orders may be made is that they are necessary or expedient for securing the public order or the efficient prosecution of any war in which His Majesty may be engaged, or for maintaining supplies or services essential to the life of the community.

The purpose of this Act is to extend the powers which may be exercised by the Crown under the Emergency Powers (Defence) Act, 1939. The Act came into force on May 22, 1940. It will be observed that the powers over person and property are virtually unlimited, but no orders have so far been made under this Act which directly affect the subject of conveyancing.

**REQUISITIONING VEHICLES.**

Transport officers and the Metropolitan Police Commissioner or a designated officer may requisition any horse or vehicle and equipment or accessories thereof, use or deal with such property and direct that no person having control of property that might be so requisitioned shall remove it from the premises where it is.

*See also* AGRICULTURE, *supra*.

**SECURITIES, GOLD, BANKNOTES, ETC.**

1940 Nos. 1254, 1484, 1514, 1590, 1732 substitute several new Regulations and add and amend others of the Defence (Finance) Regulations, 1939, dealing with restrictions on export, import, transfer, issue of documents of title, payments, etc.

1940 Nos. 1514 and 1515 restrict importation into the United Kingdom of bank notes.

**TRADE MARKS.**

Regulation 60E, added by 1940 No. 1328, extends section 3 of the Patents, etc. (Emergency) Act, 1939, to unregistered trade marks.

**TRUSTEES.**

National Loans Act, 1939, s. 4, empowers trustees to invest trust moneys in securities issued under that Act.

An Amendment of Defence (Finance) Regulations by 1940 No. 1254 appears to restrict trustees, without permission of the Treasury, from transmitting abroad moneys to which a beneficiary is entitled who is not resident in the United Kingdom or in any of the "sterling" countries specified in 1940, No. 1256.

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# LIABILITIES OF LANDLORD AND TENANT IN RESPECT OF NON-REPAIR, NUISANCE AND DANGEROUS PREMISES (*With Special Reference to* WRINGE *v.* COHEN, [1940] 1 K. B. 229).

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

## PART I.

### NUISANCE TO THIRD PARTIES.

It is proposed in this article, the second part of which will appear in a subsequent issue of *The Conveyancer*, to consider the various principles of law involved in the decision of the Court of Appeal in *Wringe* v. *Cohen*, [1940] 1 K. B. 229; 109 L. J. K. B. 227, and to link up that case with the whole subject of the liabilities of landlord and tenant in respect of non-repair and dangerous premises both in tort (on the ground of nuisance or negligence) and in contract (on the covenant, express or implied, as between landlord and tenant), and the liabilities of landlord and tenant respectively will be considered both in relation to each other and in relation to third parties.

Since no separate note of *Wringe* v. *Cohen* has appeared in this journal, this discussion will be prefaced with a short note of the actual decision in *Wringe* v. *Cohen*.

(i) *The actual decision in* Wringe *v.* Cohen.

In *Wringe* v. *Cohen*, [1940] 1 K. B. 229; 109 L. J. K. B. 227, the gable end of an adjoining house collapsed owing to a storm and fell through the roof of the plaintiff's shop. Both house and shop fronted on to a highway. The defendant was the owner of the house, he having let it to a tenant but remaining liable for repairs. According to the evidence the wall had been in defective repair for three years. It was found as a fact that the wall was in a defective condition and a nuisance owing to want of repair, but there was no evidence or finding that the defendant either knew or ought to have known of the defects.

The owner of the house was held liable for the damage to the roof of the shop. A unanimous judgment of the Court of Appeal (consisting of Slesser and Luxmoore, L.JJ., and Atkinson, J.) was read by Atkinson, J., in the course of which (at p. 233) Atkinson, J., enunciated the following principles of law as those upon which the decision of the Court was based : " In our judgment if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not. The undertaking to repair gives the owner control of the premises, and a right of access thereto for the purpose of maintaining them in a safe condition. On the other hand, if the nuisance is created, not by want of repair, but, for example, by the act of a trespasser, or by a secret and unobservable operation of nature, such as a subsidence under or near the foundations of the premises, neither an occupier nor an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue. In such a case he has in no sense caused the nuisance by any act or breach of duty. I think that every case decided in the English Courts is consistent with this view."

The above statement of the law is summarised in the headnote to the case and was supported by reference to many earlier decisions which are reviewed at some considerable length in the judgment. Most of these will be discussed later in this article. For the present it is desired to draw attention to the actual principles of law laid down in *Wringe* v. *Cohen*. In the first place the law stated is expressly limited to the case of (a) premises " on "

(presumably " adjacent to " is meant) a highway which (b) are a nuisance *owing to want of repair*. As to (a) the Court equates the duty owed to an adjoining owner to that owed to a passer-by. As to (b) the Court draws a distinction between a nuisance which arises owing to want of repair and one which arises from some other cause. In the second place, where a case falls within the limitations specified above, the Court makes the liability of the owner, as distinct from that of the occupier, dependent upon the existence of an obligation binding between the owner and the occupier whereby the owner undertakes the duty of repair. If there is such an obligation, then the rule laid down is that the owner is liable for the nuisance whether he knew or ought to have known of the danger or not. All the time it must be remembered that *Wringe* v. *Cohen* is decided upon the footing of nuisance, between parties who have made no contract with one another as to the repair of the property.

It is proposed now to turn back to the general rules of law governing the liability of the occupier and his landlord in respect of nuisances and dilapidations. It is convenient to consider first the liability of either to third parties on the ground of nuisance.

### (ii) *The liability of the occupier for nuisance.*

The first group of cases which may be referred to on this subject concern the liability of occupiers to be indicted in respect of public nuisances arising on their property. Into this group fall *R.* v. *Watson* (1703), 2 Ld. Raym. 856; 3 Ld. Raym. 18, and *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631, where at p. 651 Blackburn, J., states the law succinctly in the words, " Persons who maintain their property so as to be a public nuisance are indictable ". Somewhat analogous is the liability of an occupier upon whose land a public nuisance exists to an action by the Attorney-General at the relation of a member of the public. It seems that the same principle applies whether criminal proceedings are brought or an information laid by the Attorney-General as representing the public; the liability of the occupier is the same and is an absolute one, it being his duty to prevent the land in his occupation becoming a nuisance : see *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560.

The next group of cases which fall to be considered concern the liability of the occupier of premises in tort for a nuisance thereon. This liability may be in respect either of a private nuisance or of a public nuisance which has become actionable at the suit of a private individual by reason of special damage suffered

(as to which see *Campbell* v. *Paddington Corporation*, [1911] 1 K. B. 869). The liability in tort for a nuisance is primarily the liability of the occupier : see *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401, *per* Bovill, C.J.; *White* v. *Jameson* (1874), L. R. 18 Eq. 303, *per* Sir G. Jessell, M.R. And his liability is such that it is no defence for him to say that he has taken all reasonable care to prevent it : *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588. The liability of an occupier for nuisance does not therefore depend upon the principle of negligence. The occupier is liable for allowing the continuance of a nuisance on his premises even though it was put there before he took possession : see *Broder* v. *Saillard* (1876), 2 Ch. D. 692, and other cases cited in *Salmond on Torts* (9th ed.) at p. 244.

On the other hand, the case of *Barker* v. *Herbert*, [1911] 2 K. B. 633, shows that where the nuisance is caused by the act of a trespasser the occupier is not liable for damage caused thereby unless he has neglected for an undue time after he became aware of it, or, if he had used reasonable care, ought to have become aware of it, to abate or prevent the danger or nuisance. The same principle has been applied where the nuisance has arisen in some other way independently of any causation by the occupier or neglect of duty on his part, as by the latent defect of a bough of a tree (*Noble* v. *Harrison*, [1926] 2 K. B. 332). And in *Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K. B. 341, a majority of the Court of Appeal (consisting of Bankes, L.J., and Astbury, J., Scrutton, L.J., dissenting) went so far as to lay down the broad principle that where the possessor of land on which a private nuisance exists is entirely innocent of either creating or continuing it, he is not liable in respect of the nuisance. In this respect the Court of Appeal drew a clear distinction between the rule applicable to a private nuisance and that applicable to a public nuisance, Bankes, L.J., saying : "It is clear that in the case of a public nuisance, when once the existence of the nuisance upon his land becomes known to the occupier of the land, it is his duty to abate it, or to endeavour to abate it, even though he is entirely innocent of either causing the nuisance or allowing it to continue : *Barker* v. *Herbert*, [1911] 2 K. B. 633; *Harrold* v. *Watney*, [1898] 2 Q. B. 320. I can find no authority which suggests that the same standard of duty is required of the occupier of land in the case of injury resulting from a private nuisance on his land. Every consideration, apart from authority, appears to me to point in a contrary direction." Notwithstanding this, Talbot, J., expressed the clear view in *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551, at p. 562, that the same principle governs

liability whether the plaintiff is suing as a member of the public or as a private individual. And *Job Edwards, Ltd.* v. *Birmingham Navigations* has now been overruled by the House of Lords in *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] 3 All E. R. 349, where the occupier's liability for a nuisance created by a trespasser has been clearly defined. When a nuisance has been created without the act, authority or permission of the occupier, the occupier is nevertheless responsible for it if, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement, and there is no distinction to be drawn between the occupier's duty in the case of a private nuisance and his duty in the case of a public nuisance. In fact the House of Lords has approved the dissenting judgment of Scrutton, L.J., in *Job Edwards, Ltd.* v. *Birmingham Navigations.*

The above cases of nuisance are to be distinguished from cases of injury to invitees and licensees who come upon the occupier's own premises, where questions may arise which are superficially similar but are really based upon a fundamentally different principle of liability. Those cases will be considered in the third Part of this Article.

(iii) *The liability of the person who creates the nuisance.*

In addition to the occupier, the rule is that he who by an act of misfeasance creates a nuisance is liable for it. So the person who actually erects a building which constitutes a nuisance, though he builds on the land of another, continues liable for the nuisance so long as the consequences of his own wrongful act continue : see *Thompson* v. *Gibson* (1841), 7 M. & W. 456. By the same principle of liability, an occupier who creates a nuisance upon the land occupied by him, and then assigns over his interest in the land to another, remains liable for the continuance of the nuisance : *Roswell* v. *Prior* (1701), 12 Mod. 635.

(iv) *The liability of the landlord for nuisance.*

A landlord is not as such liable for nuisances which exist upon the demised premises, though he may become so liable in a variety of ways. Thus, if he himself actually created the nuisance, he will remain liable for its continuance, on the principle stated above. So a landlord who installed a heating apparatus operated by an electric motor, which caused a nuisance to the occupier of adjoining premises, was regarded as responsible for the nuisance on the ground that he had let the premises where the motor was

installed with a nuisance which he had himself created (*Metropolitan Properties, Ltd.* v. *Jones*, [1939] 2 All E. R. 202). A landlord is liable for the nuisance if he lets premises which to his knowledge are in a ruinous and dangerous condition and causes or permits them so to remain until by reason of their want of reparation they fall upon and injure the house of an adjoining owner (*Todd* v. *Flight* (1860), 9 C. B. (N.S.) 377, and see *Woodfall* (24th ed.), at p. 814). If the landlord renews a tenancy after a nuisance of a permanent character has been created on the land demised, this amounts to a letting of land with a nuisance, so as to render the landlord liable for the nuisance (see *Woodfall*, (24th ed.), at p. 814). But the mere failure to give notice to quit to the tenant under a periodic tenancy after the creation of the nuisance does not amount to a re-letting, so as to render the landlord liable : see the undelivered judgment of the Court of Exchequer Chamber in *Gandy* v. *Jubber* (1865), 9 B. & S. 15.

Again, where the very purpose for which land is let necessarily constitutes a nuisance, the letting of the land for that purpose by the landlord renders him liable in respect of the nuisance (*Harris* v. *James* (1876), 45 L. J. Q. B. 545). It is otherwise where the purpose for which the land is let does not necessarily amount to a nuisance, but the tenant chooses to carry out that purpose in such a way as to cause a nuisance. So a landlord is not liable for a nuisance caused by smoke, merely because he let the chimney pot out of which the smoke issues, it being within the power of the tenant, by the choice of fuel, to control the volume of smoke emitted : see *Rich* v. *Basterfield* (1847), 4 C. B. 783.

In all the above cases where the landlord has been held liable for the damage caused by the nuisance, some authorisation of the tenant by the landlord to commit or continue the nuisance may be inferred, and this principle of liability by authorisation of the nuisance goes even farther than has been mentioned above. The mere fact that by the terms of the tenancy the landlord remains liable for repairs is evidence that he authorises the continuance of a nuisance known to him when he lets (see *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401, and see *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658, as to the converse case). But what is the position where the landlord, though liable for repairs, is unaware of the existence of the nuisance, possibly because it has come into existence only since he let the premises? *Payne* v. *Rogers* (1794), 2 H. Bl. 350, apparently lays down the unqualified principle that if the owner of a house is bound to repair it he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair. In one respect at least this goes

too far: in so far as the case appears to lay down that if the landlord is liable for the nuisance the occupier is not, this is negatived by *Wilchick* v. *Marks*, [1934] 2 K. B. 56.

In another respect *Payne* v. *Rogers* raises a problem of great interest which has caused no little difficulty. The law there laid down is stated as a general proposition which is applicable regardless of whether or not the landlord had notice of the want of repair. But the question of the landlord's knowledge of the state of repair does not appear to have been in dispute in that case, and from the judgment of Heath, J., that "If we were to hold that the tenant was liable in this case, we should encourage circuity of action, as the tenant would have his remedy over against the landlord", it may perhaps not unreasonably be inferred that the landlord had notice of the want of reparation, because otherwise the tenant would have no cause of action upon the landlord's covenant to repair (*Torrens* v. *Walker*, [1906] 2 Ch. 166). Against this rather sweeping, but briefly expressed, statement of the law in *Payne* v. *Rogers* may be set the statement of Denman, J., in *Gwinnell* v. *Eamer* (*supra*), that to render the owner liable, circumstances must be shown such as are mentioned at the close of the judgment in *Todd* v. *Flight* (1860), 9 C. B. (N.S.) 377, the circumstances there mentioned being that the landlord knew of the ruinous condition of the premises when he let them and that he kept and maintained them in that state.

Moreover the fundamental idea upon which is based the proposition of law laid down in *Payne* v. *Rogers* has been criticised in principle. In *St. Anne's Well Brewery Co.* v. *Roberts* (1929), 140 L. T. 1, a considerable portion of the ancient city wall of Exeter, owned but not occupied by the defendants, collapsed and completely demolished the plaintiff's inn which adjoined the wall. The Court of Appeal held that it had not been proved that the defendants had knowledge of the defect which resulted in the collapse or that there had been a failure on their part by due diligence to ascertain that knowledge, and accordingly held that the defendants were not liable for the damage caused. It seems that the unsafe condition of the wall was due partly to the action of the elements upon an ancient structure, and partly to a weakening of the base of the wall by excavations on the part of the plaintiffs. There was no reason why the defendants should have known of either of these operations. They had let to weekly tenants certain premises of which the wall formed the boundary, and it was held by the Court of Appeal that this part of the wall was included in the letting. Scrutton, L.J., in delivering judgment, said (140 L. T. at p. 7): "And it appears to me that you are not able successfully to attack

an owner no longer in occupation, because he has let the premises on which there is ultimately found to be a nuisance, unless you can show that at the time he let them there was then a nuisance on the premises and that he knew it. Now in this case . . . it appears to me to be impossible to say that any of the defendants knew, either at the time they let the premises or at any time after till about a week before the wall fell, that there was anything wrong with the foundations of the wall." And again : " Under those circumstances it appears to me that the cardinal thing which would have to be proved to establish any liability against anybody would be, namely, knowledge of the defect which ultimately resulted in the fall of the wall and (or) failure to acquire that knowledge because you had failed to use reasonable care to ascertain what you should have ascertained." This judgment was assented to by both Lawrence and Greer, L.JJ.

It may be observed that in this case the nuisance was caused not so much by failure to repair as by inherent decay from natural causes and by a weakening of the base of the wall not in any way the fault of the defendants. The case is not quite the same as the case of a nuisance due directly to the failure to repair a building. Evidently there may be a difference between the degree of care which it is reasonable to expect should be exercised in order to ascertain whether any defects exist in an ancient city wall and the degree of care which it is reasonable to expect in respect of a house. It was, however, suggested in *St. Anne's Well Brewery Co.* v. *Roberts* that the liability to third parties for the nuisance depended, as between the owners and the tenant-occupier, on which of them was liable for repairs according to the terms of the contract between them. Indeed, according to *Payne* v. *Rogers*, this is the material fact upon which that question of liability turns. But Lawrence, J., said : " Mr. Roberts, indeed, argued that the question would depend upon whether under the terms of letting the duty of repairing the wall was cast upon the tenant or upon the landlord. I do not think so. Any bargain made by the person responsible may give rise to rights as between the two contracting parties, but does not, in my judgment, in any way affect any right of third parties, who are not parties or privy to such contract."

Upon principle this seems a sound criticism of any argument along the lines of the proposition laid down in *Payne* v. *Rogers*. The same criticism is expressed in *Salmond on Torts* (9th ed.) at p. 249. Nevertheless, even prior to *Wringe* v. *Cohen*, the idea has frequently been expressed that the terms of the contract between the landlord and the tenant as to repairs do affect the liability or non-liability of the landlord. Apart from *Payne* v. *Rogers*, we

may note *Todd* v. *Flight* (1860), 9 C. B. (N.S.) 377; *Pretty* v. *Bickmore* (1873), L. R. 8 C. P. 401; and *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658. In *Todd* v. *Flight* Erle, C.J., lays down the general principle that if the wrong causing the damage arises from the non-feasance or the misfeasance of the lessor, the party suffering damage from the wrong may sue him. The reference to non-feasance seems intended to include non-performance of a contract with the tenant, and the case of *Cheetham* v. *Hampson* (1791), 4 T. R. 318, cited by Erle, C.J., as an illustration, was decided in favour of the landlord because he was under no duty to repair the fences which had caused the damage, under his contract with his tenant, and therefore he was guilty of no wrong in non-repair. In *Pretty* v. *Bickmore* the landlord was expressly exonerated from liability in respect of a nuisance arising out of non-repair on the ground that the tenant was by his covenant bound to maintain and repair them. In *Gwinnell* v. *Eamer*, Brett, J., says: "But I doubt very much whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease."

It is suggested that the line of reasoning (and the only line of reasoning) whereby these authorities and the criticism of Lawrence, L.J., may be reconciled is as follows. The primary liability in respect of the nuisance being upon the occupier, the terms of the contract between the occupier and his landlord whereby the landlord takes over the liability for repairs cannot diminish the responsibility of the occupier (*Wilchick* v. *Marks*, [1934] 2 K. B. 56). On the other hand, the existence of such a contract amounts to an authority from the landlord to the tenant to permit the premises to remain in the condition in which they are, so that if a nuisance exists thereon the landlord impliedly authorises its continuance unless he takes active steps to terminate the nuisance. This does not exonerate the tenant, but renders the landlord also liable.

Still there remains the question, can the landlord be said to have authorised the continuance of a nuisance the actual existence of which is unknown to him? In *Wilchick* v. *Marks* Goddard, J., treats it as established law that where the landlord has assumed an obligation to repair he is liable to a person injured through disrepair, although, he says, to that must be now added that the plaintiff must prove that he had knowledge of the state of disrepair, citing as authorities for the latter part of his statement *Morgan* v. *Liverpool Corporation*, [1927] 2 K. B. 131, and *St. Anne's Well Brewery Co.* v. *Roberts* (1929), 140 L. T. 1. One might add to the above stipulation for knowledge on the part of the landlord of

the state of disrepair, the alternative, on the authority of *St. Anne's Well Brewery Co.* v. *Roberts*, of a lack of knowledge which is due to a failure to use reasonable care to find out. But *Wringe* v. *Cohen*, [1940] 1 K. B. 229, cuts clean across this line of thought with a declaration in general terms that "if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not" (*per* Slesser, L.J., at p. 233). Leaving aside for a moment the curious qualification "on a highway", it will be seen that the Court of Appeal has in this case substantially affirmed the proposition laid down in *Payne* v. *Rogers*. At the same time, the case of *St. Anne's Well Brewery Co.* v. *Roberts* is distinguished by a careful limitation (so far as the owner is concerned) of the decision in *Wringe* v. *Cohen* to cases where (a) the nuisance arises from want of repair and (b) the owner has undertaken the duty of repair. Slesser, L.J., points out (p. 246) that in *St. Anne's Well Brewery Co.* v. *Roberts* the owners had not undertaken any obligation to repair, and the collapse of the wall was not due to disrepair. Evidently the Court of Appeal was bringing the case of *Wringe* v. *Cohen* carefully within the law laid down by Erle, C.J., in *Todd* v. *Flight*, as a case of non-feasance on the part of the lessor, but at the same time Slesser, L.J., rejects the statement of Goddard, L.J., in *Wilchick* v. *Marks*, [1934] 2 K. B. at p. 66, that in addition to the landlords obligation to repair there must be added notice on his part of the disrepair in order to render him liable for the nuisance caused thereby.

This introduces a curious feature of *Wringe* v. *Cohen* and of the law there stated which produces an anomaly difficult to explain away. According to *Wringe* v. *Cohen*, in the circumstances there postulated the lessor is liable *whether he knew or ought to have known of the danger or not*. Slesser, L.J., by way of justification for this says: "The undertaking to repair gives the owner control of the premises, and a right of access thereto for the purpose of maintaining them in a safe condition." In fact there is authority for the statement that a covenant by the lessor to repair implies on the part of the tenant a licence to the landlord to enter upon the premises for a reasonable time for the purpose of executing the necessary repairs: *Saner* v. *Bilton* (1878), 7 Ch. D. 815. But it is surely going a little too far to say that the owner is thereby given control of the premises. *Morgan* v. *Liverpool Corporation*, [1927] 2 K. B. 131 (C. A.), shows that even where the landlord has a right of access to effect repairs which are his responsibility, the

tenant is still the occupier and the landlord's liability does not arise, as between landlord and tenant, until he has been given notice of the disrepair. Lord Hanworth, M.R., says at p. 141 : " It has long been established law that where there is a covenant on the part of a landlord to keep the premises in repair, the tenant must give notice to the landlord of what is out of repair, for he, the tenant, being in occupation has an opportunity of knowing what the condition of the premises is, an opportunity denied to the landlord who may be at a distance." It follows from this that until the landlord has been given notice of the disrepair, there is no non-feasance on his part, no breach of duty as between himself and his tenant. Yet if the non-repair of which the landlord is ignorant causes a nuisance to an adjoining owner or to a passer-by, the landlord is on the authority of *Wringe* v. *Cohen* liable for such nuisance. This is a curious position, and if the liability of the landlord for nuisances on the demised premises is to be based upon the principle of authorisation express or implied, it seems to mean that by covenanting to repair the premises the landlord is deemed to have authorised the tenant to use them in a state of disrepair amounting to a nuisance without giving the landlord notice of the disrepair or calling upon him to effect repairs. It is difficult to stretch the doctrine of authorisation as far as this and probably it must be admitted that in this particular direction the law as laid down in *Wringe* v. *Cohen* has gone beyond the principle of implied authorisation. The landlord's liability appears even more stringent when compared with the duty of an owner-occupier in respect of a nuisance created without his act, authority or permission (see *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] 3 All E. R. 349, discussed in section (ii), *supra*), for the owner-occupier is exonerated if he has neither knowledge or means of knowledge of the existence of that nuisance.

### (v) *Liability to Users of Highway.*

Attention has been drawn above to the curious feature of the decision in *Wringe* v. *Cohen* that it is expressed to be limited to the case of premises " on a highway ". Precisely what bearing the proximity of a highway has upon the liability to the owner of adjoining premises it is not easy to understand. If the fact that premises are near to a highway introduces a special duty to users of the highway, it is not easy to see what relevance this has to the duty to an adjoining owner. In fact, as has been seen above, the decision in *Wringe* v. *Cohen* can be fitted more or less into the framework of law provided by earlier decisions without reference

to the cases specifically referring to nuisance to highways, although *Wringe* v. *Cohen* in one respect mentioned above goes further than other cases. But cases on nuisance to highways were considered at length by the Court of Appeal in *Wringe* v. *Cohen*, and Slesser, L.J., even said that perhaps the most important case for the consideration of the Court was *Tarry* v. *Ashton*.

*Tarry* v. *Ashton* (1876), 1 Q. B. D. 314, is the leading authority upon the occupier's liability in respect of a nuisance to passers-by using a highway. There Lush and Quain, JJ., laid down the principle that if a person maintains a lamp projecting over the highway for his own purposes it is his duty to maintain it so as not to be dangerous to the passengers, and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. Blackburn, J., in the same case was careful to limit his judgment to the actual facts before him, which included actual notice that the lamp might be getting out of repair, but Lush and Quain, JJ., seem to infer that there is an absolute duty on the occupier to prevent such a structure becoming a nuisance. In *Noble* v. *Harrison*, [1926] 2 K. B. 332, at p. 338, Rowlatt, J., distinguishing the case of a tree, which is kept from falling by the natural processes which develop the tree, suggests that it may be that, where a heavy object is suspended over a highway, and must fall into it unless supported by artificial things which can only be kept in order by the person in possession of the premises, such person is bound absolutely to maintain the attachments. Wright, J. (as he then was), in the same case (p. 343) distinguishes *Tarry* v. *Ashton* in these words: "That case is clearly distinguishable from the present case, because the defect in the lamp was not latent and the lamp was a heavy artificial object, which necessarily required and was capable of inspection." In *Harrold* v. *Watney*, [1898] 2 Q. B. 320, the duty of the owner (who was presumably in occupation although the point is not expressly mentioned) in respect of a defective fence adjoining a highway seems to have been placed upon the footing of an absolute liability in nuisance and there is no mention of knowledge or negligence on the part of the owner. But in *Barker* v. *Herbert*, [1911] 2 K. B. 633, Vaughan Williams, L.J., in answer to the argument that the possessor of premises adjoining a highway warrants to the whole world that there shall be no nuisance on his premises adjoining the highway such as to cause danger to any person using the highway, said (p. 636): "In my opinion there is no such absolute responsibility as that contended for imposed upon a person who has property adjoining a highway, even although a portion of that property may be an area which, if unprotected by a fence or railing

of some sort would constitute a danger to those using the highway. In my judgment there can be no liability upon the part of the possessor of land in such a case, unless it is shown either that he himself, or some person for whose action he is responsible, created that danger which constitutes a nuisance to the highway, or that he has neglected for an undue time after he became, or, if he had used reasonable care, ought to have become, aware of it, to abate or prevent the danger or nuisance. In my opinion it is not the law that there is an absolute duty such as is contended for, where the possessor of the land has neither created the nuisance, nor suffered it to continue."

It is not easy to draw, out of the cases mentioned above, any clear differentiation between the principles applicable to the occupier's liability for a nuisance to the highway and those applicable to his liability for a nuisance to an adjoining owner. But in the case of the owner's liability in respect of such nuisances a question still arises whether some such distinction is to be drawn. In the case of *Wilchick* v. *Marks*, [1934] 2 K. B. 56, a shutter which was defective to the knowledge both of the tenant and the landlords fell upon and injured a passer-by upon the highway. Neither the landlords nor the tenant were under a covenant to repair, but the landlords had reserved a right to enter and do repairs; it was held by Goddard, J., that the landlords, although not under contract to repair, having reserved the right to do so and, knowing that repairs were necessary, having failed to do them, were liable in respect of the injury. At the same time, the tenant was not exonerated by reason of the liability cast upon the landlord. It will be seen, therefore, that the liability of the landlord in respect of a nuisance upon the demised premises has in one respect actually been extended further in the case of a nuisance to a highway than it has as between adjoining owners: *Wringe* v. *Cohen* and all the earlier cases as between adjoining owners proceed upon the footing that the landlord has as between himself and the tenant undertaken the obligation of repairs. In *Wilchick* v. *Marks* this was not so; there was no such *obligation* upon the landlord, although it was evidently contemplated that the landlord would wish to execute such repairs as became necessary from time to time. Goddard, J., expresses his opinion upon the position thus arising in these words: "A property owner knows that his house if not repaired must at some time get into a dangerous state: he lets it to a tenant and puts him under no obligation to keep it repaired: it may be the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs: why then should he be under no duty to make it safe for

passers-by when he knows that the property is dangerous? The proximity is there : he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant, who in this sort of tenancy, which commonly obtains only with regard to small properties, is probably in quite humble circumstances? "

It is a fact of course that the above remarks were made in a case upon nuisance to a highway, and may only be applicable to such a case. But it must be borne in mind that this part of Goddard, J.'s judgment was in no wise disapproved by the Court of Appeal in *Wringe* v. *Cohen* and it is clear from the judgment of Slesser, L.J., at p. 233 in that case, that where premises are adjacent to a highway he equates the owner's liability to an adjoining owner to his liability to the owner of adjoining premises. The conclusion may therefore be reasonably drawn that the Court which decided *Wringe* v. *Cohen* would extend the reasoning of Goddard, J., quoted above, to the case of the owner's duty to an adjoining owner. If this be correct, then the same principles seem to govern liability in respect of a nuisance to a highway as are applicable to a nuisance to the owner of adjoining property. This view is supported by the judgment of the Divisional Court (Acton and Talbot, JJ.), in *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551. At p. 562 Talbot, J., delivering the judgment of the Court, says : " Again, there is no doubt that if this guttering had overhung the street in the condition proved in the case before us, and had fallen on someone passing below and injured him, that person would have had an action against the defendants on the principle of *Tarry* v. *Ashton*. What is that principle? It is in our opinion that anyone in occupation and control of something hung over a place, in which people may be expected lawfully to be, is bound to take reasonable care that it does not fall and injure them. This seems to us to be both law and justice; and, as we have already said, it is, in our opinion, immaterial whether in such a case the plaintiff is in the place where he is injured as one of the King's subjects entitled to use the highway, or in the exercise of any other legal right. A closely similar principle applies to work done or chattels kept or moved in the like dangerous situations : see such cases as *Byrne* v. *Boodle* (1863), 2 H. & C. 722; and it makes no difference whether the plaintiff was in the highway, as in that case, or in any other place where he had a right to be, and where people might be expected to be : *Scott* v. *London and St. Katherine Docks Co.* (1865), 3 H. & C. 596."

Since the foregoing was written the Court of Appeal has applied *Wilchick* v. *Marks* and *Wringe* v. *Cohen* to a case of a defective

cellar flap where neither the landlords nor the tenant had covenanted to do external repairs and, although the landlords had reserved a right to enter to make good defects, they had no notice of the defect in question : *Heap* v. *Ind Coope and Allsopp, Ltd.* (1940), 56 T. L. R. 948. A passer-by using the highway was held entitled to recover damages from the landlords in respect of injuries suffered by him through the cellar flap giving way, the Court of Appeal stating that in view of the two cases cited above the plaintiff was in such a case entitled to recover from the landlords whether the landlords knew of the defect or not.

Now in this case it does not appear to have been known who actually created the defect which caused the accident. Certainly there was no suggestion that the landlord was in any way responsible for its creation, only for its non-repair. MacKinnon, L.J., placed the landlord's obligation upon this basis : Goddard said, in *Wilchick* v. *Marks* : "The landlord has expressly reserved to himself the right to enter and do necessary repairs : why, then, should he be under no duty to make it safe for passers-by when he knows that the property is dangerous?" But since *Wringe* v. *Cohen* the words "when he knows that the property is dangerous" must be rejected, so that the landlord who has reserved the right to enter and do necessary repairs is under a duty to make the property safe for passers-by whether or not he had any reason for knowing the property to be dangerous.

How does this compare with the liability of an owner-occupier as defined in *Sedleigh-Denfield* v. *St. Joseph's Missions*, [1940] 3 All E. R. 349? It has already been seen that, according to the House of Lords in that case, when a nuisance has been created without the act, authority or permission of the occupier, the occupier is not responsible unless *with knowledge or means of knowledge* of its existence he suffers it to continue without taking reasonably prompt and efficient means for its abatement. The owner-occupier can enter for the purpose of doing necessary repairs at any time; he has a far better means of knowledge of the existence of a defect than the landlord who can only be expected to examine the property at regular intervals of time. Yet, in respect of defects which fall within the category of disrepair, the landlord's liability actually seems in *Wringe* v. *Cohen* and *Heap* v. *Ind Coope and Allsopp, Ltd.*, to have been made more strict and onerous than that of an owner in occupation who has not given rise to the nuisance himself. While of course it does not require great ingenuity to distinguish the facts in the cases named above from those in *Sedleigh-Denfield* v. *St. Joseph's Missions*—for example, in the latter case there was no question of proximity to a highway and

the nuisance was not due to any defect in the structure of a building —nevertheless some doubt may be felt as to the extent to which such matters really go to the roots of the principles involved, and there appears to be some ground for suggesting that there is a conflict of principle between the Court of Appeal decisions on the liability of the landlord and the House of Lords decision on the liability of the occupier.

(vi) *Liability under the rule in* Rylands *v.* Fletcher.

It is not proposed here to enter exhaustively into the rule in *Rylands* v. *Fletcher* (1866), L. R. 1 Ex. 265; (1868), L. R. 3 H. L. 330, but to observe that, although both in that case itself and in other cases where it is referred to (see, for example, *Carstairs* v. *Taylor* (1871), L. R. 6 Ex. 217, *per* Martin, B., at p. 223) the liability under that rule is described as a liability between adjoining owners, it is thought that what is really meant is that it is the liability of a person who by virtue of his ownership or other right in land *brings on to that land* the artificial thing which escapes elsewhere to the injury of another. Indeed the rule in *Rylands* v. *Fletcher* applies to the ownership of adjoining chattels in a highway (*Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 772) where the owners of the chattels have no more than a licence to keep their chattels in that place. The principle that the person who brings the dangerous thing on the land, although not the occupier or owner of the land, is liable under the rule of *Rylands* v. *Fletcher* was made clear by the House of Lords in *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] 2 A. C. 465, and it appears from the same case that the occupier may be liable under the same rule if the dangerous thing was brought or collected on the land not by him necessarily but for his purposes or with his permission (see also *Clerk and Lindsell on Torts* (9th ed.), p. 481).

It is clear from the cases cited above that the landlord does not as such incur liability under the rule in *Rylands* v. *Fletcher* in respect of a dangerous thing brought or accumulated upon the demised premises, but he may be liable to an adjoining owner as the person who brought or collected the thing there or for whose purposes it was so brought or collected. Where the landlord has constructed an artificial structure upon the premises for the benefit (in whole or in part) of his tenants, and water escapes therefrom to the injury of one of his tenants, the tenant has no remedy against the landlord under the rule in *Rylands* v. *Fletcher*, because the collection of the water was for the benefit of the tenant : *Carstairs*

v. *Taylor* (1871), L. R. 6 Ex. 217. But if the escaping water had injured an adjoining owner, it would seem that the landlord would then have been liable upon the principle of *Rylands* v. *Fletcher*, since he had brought the accumulation of water upon the premises.

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## THE WAR AND MORTGAGES.

By E. O. WALFORD, LL.D., Solicitor.

(*Continued from p. 59.*)

*Enforcement of orders for possession of land.*

Leave of the Court must be obtained to proceed to execution on or otherwise to the enforcement of any judgment or order of any Court, whenever given or made (unless made in proceedings for enforcing a contract made on or after September 2, 1939) for the recovery of possession of land by a mortgagee thereof by reason of a default in the payment of money, or for the delivery of any property other than land by reason of a default in the payment of money (C. E. P. Act, 1939, s. 1 (3), as amended by section 2 of the P. M. Act, 1939, and section 3 of the C. E. P. Act, 1940).

As to the meaning of "judgment" or order for the recovery of possession of land, *vide supra*.

Further provisions concerning the recovery of possession of land comprised in mortgages are contained in the P. M. Act, 1939, *infra*.

### POSSESSION OF MORTGAGED LAND (EMERGENCY PROVISIONS) ACT, 1939.

The provisions of the P. M. Act, 1939, like those of the C. E. P. Act, 1939, apply to mortgages of controlled premises as well as to other mortgages of land (including land with buildings thereon). The Act may be summarised as follows :—

(1) It applies only to mortgages made before September 3, 1939; but the "commencing" date of the Act was September 21, 1939 (section 1 (1)).

(2) It does not apply where the mortgagee has obtained possession before September 21 (not September 3), 1939, but does apply in relation to proceedings begun before that date (section 1 (3)).

(3) It appears to apply to all mortgages of land whether legal or equitable (made before September 3, 1939) and prohibits the taking of possession of land unless one or more of the following events has happened :—

(a) Default has been made in payment of the mortgage money or any part thereof (section 1 (1)). But in the case of a mortgage not repayable by instalments default here means failure to pay for a period of three months after service on the person liable of a written demand for payment. [This is reminiscent of the restriction imposed by section 103 (i) of the L. P. Act, 1925, upon the exercise of a power of sale (subject to any provision to the contrary in the mortgage),] or

(b) Default has been made in the payment of any interest (section 1 (1)). Here it will be recalled that the provisions of section 103 of the L. P. Act, 1925, requiring that interest should be in arrear for two months restrict only the exercise of the power of sale and not of taking possession, or

(c) There has been a breach on the part of the mortgagor or of some person (*e.g.*, a guarantor) concurring in the making of the mortgage, of any other obligation arising under or by virtue of the mortgage (section 1 (1)).

(4) Where the mortgagee has obtained an order or judgment for the recovery or delivery of possession before September 21, 1939, then, unless the contrary appears, " a default in the payment of money " will be deemed to have been made and the order or judgment will be deemed to have been made or given by reason of that default (section 1 (3)). Accordingly section 1 (3) of the C. E. P. Act, 1939 (*supra*), will come into play and the mortgagee will not be able to proceed to the enforcement of the order without the leave of the Court.

By a proviso to section 1 (3) of the P. M. Act, 1939, the Court can, on application by any party to the proceedings in which the order or judgment was made or given, rescind or vary it in such manner as appears to be just in view of the provisions of section 1 of the P. M. Act, 1939.

It is submitted that if the mortgagee had before the application lawfully taken possession the Court would not normally interfere. It must be remembered that if the mortgagee was lawfully in possession before September 2, 1939, he is expressly permitted by the C. E. P. Act, 1939, to exercise his power of sale (section 1 (2), proviso); but if he was not in possession before September 2, 1939, then

(a) He would have to obtain the leave of the Court before taking possession or selling (C. E. P. Act, 1939, s. 1 (2) (a)).

(b) If he obtained an order giving him the right to go into possession he would need leave to execute the order under the C. E. P. Act, 1939, s. 1 (3), as amended by the P. M. Act, 1939, s. 2, if the recovery of possession was by reason of default *in the payment of money*. No doubt such leave will in practice be applied for at the same time as the order for possession. Such leave would be unnecessary if the default consisted of a breach of some other obligation : see P. M. Act, 1939, s. 2; and C. E. P. Act, 1939, s. 1 (3).

### POSITION WHEN LEAVE APPLIED FOR.

(1) *Object of requiring leave* (C. E. P. Act, 1939, s. 1 (4)).

The object of requiring that the leave of the Court shall be obtained in the cases enumerated above is to enable the mortgagor to show if he can that his inability to satisfy the judgment or order or to pay the mortgage debt is due to circumstances directly or indirectly attributable to the war, in which event the Court may refuse leave for the exercise of the right or remedy sought to be exercised by the mortgagee, or may give such leave, subject to such restrictions and conditions as the Court thinks fit (C. E. P. Act, 1939, s. 1 (4)).

As to the general effect of this provision reference should be made to *Krusin & Rogers' Handbook of War Legislation*, p. 16, and the Supplement thereto, pp. 3, 4.

(2) *Other liabilities may be taken into account* (C. E. P. Amendment Act, 1940, s. 2).

It must, however, be noted that by section 2 of the C. E. P. Amendment Act, 1940, it is enacted as follows :

"(1) It is hereby declared for the removal of doubt that on an application for leave to exercise any of the rights or remedies mentioned in sub-sections (1), (2) and (3) of section one of the principal Act [C. E. P. Act, 1939], the appropriate Court—

"(a) in determining whether the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged; or

"(b) in determining the restrictions and conditions (if any) subject to which the leave is to be given;

may take account of other liabilities, whether present or future, of that person:

"Provided that nothing in this sub-section shall be construed as affecting the provisions of the foregoing section of this Act or as enabling the court to make the leave conditional on a failure to satisfy any such other liability.

"(2) Rules made under the principal Act [C. E. P. Act, 1939] may provide for the service of notice of any such application upon persons, other than the applicant, having claims against the person liable as aforesaid, and for enabling such persons to be heard at the hearing of the application."

(3) *Leave not to be conditional on default in certain respects* (C. E. P. Amendment Act, 1940, s. 1).

This section, *which does not apply to controlled dwelling-houses*, provides that where an application is made by (*inter alia*) a mortgagee of premises for leave to exercise any of the rights and remedies mentioned in sub-sections (1), (2) and (3) of section 1 of the C. E. P. Act, 1939, being a right or remedy arising in consequence of a default in the payment of any instalment of or interest on mortgage moneys, the Court must not make such leave conditional on any default in the payment of any mortgage money or interest falling due after the date of the hearing. Nevertheless, on any subsequent application for leave to exercise the same right or remedy, the Court can vary the conditions or give unconditional leave, if it thinks fit, having regard to any such default which has in fact occurred between the date of the first and the subsequent application.

Thus, if the mortgage is an instalment mortgage and two monthly instalments are in arrear the Court cannot make an order for the payment by a certain date of those instalments and couple with it a provision giving leave, *e.g.*, to sell the property, if the mortgagor makes default in the repayment of the mortgage or of instalments or interest subsequently falling due. And whether the mortgage is repayable by instalments or not the Court cannot give leave to sell the property if the mortgagor makes default in paying any interest subsequently falling due. The mortgagee must make a new application if there is such default.

(4) *Special provisions affecting persons in the armed forces* (C. E. P. Amendment Act, 1940, s. 3).

Normally the mortgagor will have to prove that his inability to pay, or to satisfy the judgment, is due to circumstances attributable to the war. It is, however, provided by section 3 of the C. E. P. Amendment Act, 1940, that where the mortgage is a mortgage of a dwelling-house and the mortgagor is serving in the armed forces (not including the L. D. V.s—now known as the Home Guard: see section 7 (2)), or is mainly dependent on a person so serving, then in relation to any application for leave to exercise any of the rights or remedies mentioned in section 1 (2) or (3) of the C. E. P. Act, 1939, the Court, unless satisfied (a) that the mortgagor is able immediately to pay the debt or to perform the obligation in question, or (b) that his inability to do so does not arise by reason of circumstances directly or indirectly attributable to the war, may in its absolute discretion either refuse leave or give leave subject to such restrictions and conditions as it thinks proper.

Moreover, by sub-section (2) of the same section, if the mortgagor is not present or is not represented there is a *prima facie* presumption that the mortgagor is a person serving in the armed forces or mainly dependent on such a person. It is doubtful whether this provision will recommend itself to all. By staying away from the Court apparently any mortgagor of a dwelling-house can get the benefit of this presumption. It may not be too easy to find out whether a mortgagor who is not living in the mortgaged property is or is not serving in the armed forces. Even if it can be shown that he (or she) is not so serving, the mortgagee still has to show that he (or she) is not mainly dependent upon such a person. If the mortgagee cannot surmount both these obstacles the Court may in its absolute discretion refuse leave (or give leave subject to any restrictions and conditions), unless it is proved either that the mortgagor is able immediately to pay the debt or perform the obligation in question or that his inability to do so is not due to the war. The section with which we are dealing here does not apply if the mortgagee is seeking to enforce a judgment or order for the payment or recovery of any mortgage money or interest, because it is limited to the rights or remedies mentioned in section 1 (2) and (3) of the C. E. P. Act, 1939 (as amended by the P. M. Act, 1939), and judgments for "the payment or recovery of a sum of money" come under section 1 (1) of the C. E. P. Act, 1939. This section (*i.e.*, section 3) of the C. E. P. Amendment Act, 1940, does, however, apply to applications for leave to enforce an order for the recovery of *possession of land* by a mortgagee "by

reason of a default in the payment of money ", because such orders were brought within section 1 (3) of the C. E. P. Act, 1939, by section 2 of the P. M. Act, 1939.

(5) Ex parte *leave to appoint a receiver* (C. E. P. Amendment Act, 1940, s. 3 (3)).

By section 3 (3) of the C. E. P. Amendment Act, 1940, it was stated that provision might be made by rules for the appointment *ex parte* of a receiver of the rents and profits of a mortgaged *dwelling-house*. It is now provided by Rule 2 of the C. E. P. (No. 2) Rules, 1940, made July 18, 1940, that such *ex parte* applications may be made in the circumstances therein mentioned.

(6) *Mortgages of controlled houses.*

As to the position in connection with mortgages of houses which are controlled by the Rent Acts, see the section CONTROLLED MORTGAGES, *infra*.

### TIME FOR APPLICATION FOR LEAVE TO SELL, ETC.

In *Re Royal Bank of Scotland*, [1940] 3 All E. R. 476, a premature application for leave was made for possession and the right to sell the mortgaged property. An equitable charge had been executed in 1936. On May 15, 1940, the chargees gave notice calling in the moneys secured by the charge. About a fortnight later the chargees applied for an order giving leave to exercise the remedies available to them including possession and the right to sell the property charged. The effect of the wording of the charge, as read with section 103 of the L. P. Act, 1925, was that those remedies would not be available until August 15, 1940. Bennett, J., therefore refused to deal with the application until that date had arrived and ordered that the chargees should bear the costs of the adjournment. In view of the possibility that the borrower might pay off the moneys secured by the charge it would also have been inequitable for that reason to saddle the borrower with the costs of such a premature application. The earliest date for the consideration of the question whether the debtor is unable to pay owing to the war is the date when he becomes liable to make the payment.

### POSITION OF PURCHASER ON SALE BY MORTGAGEE.

What is the duty of a purchaser who is purchasing property from a mortgagee? If the mortgagee states that he was in possession or had appointed a receiver prior to September 2, 1939,

and is thus entitled to sell without the leave of the Court, the purchaser should require a statutory declaration to this effect, preferably by an independent person, but otherwise by the mortgagee, or by his receiver if one has been appointed. The purchaser will have to pay the expenses of preparing and completing this declaration (*Re Wright and Thompson's Contract*, [1920] 1 Ch. 191). But what if the mortgagee either makes no disclosure, or admits that he had not entered into possession or appointed a receiver before September 2, 1939? The case of *Anchor Trust Co.* v. *Bell*, [1926] Ch. 805, may well serve as a warning beacon to the purchaser. There it was held, where a mortgagee had taken possession contrary to a statutory provision, that a purported sale and conveyance by him as mortgagee was ineffective except as a transfer of the mortgage to the purchaser who *had notice* of the facts. It seems likely that section 21 of the Conveyancing Act, 1881, was a sufficient protection to a purchaser who had completed his purchase without notice of the fact that leave of the Court was necessary and had not been obtained (*Bailey* v. *Barnes*, [1894] 1 Ch. 25; *Life Interest, etc., Corporation* v. *Hand-in-Hand, etc., Society*, [1898] 2 Ch. 230). But it was necessary that the purchaser should not have notice (express or constructive) of that fact, if he was to be protected. By section 5 (1) of the Conveyancing Act, 1911, it was declared that a purchaser was not (before or on conveyance) concerned to inquire whether a case had arisen to authorise the sale, or due notice had been given, or the power was otherwise properly and regularly exercised. This sub-section was reproduced in section 104 of the Law of Property Act, 1925 (which only applies to mortgages created after December 31, 1925). In that section it is also declared that the title of a purchaser is not impeachable (*inter alia*) on the ground that leave of the Court to the sale was not obtained. However, this leaves the position as to mortgages executed before January 1, 1926, under the old law. Having regard to the decision in the *Anchor Trust Case* it is clear that where the abstract shows that the leave of the Court may have been necessary to effectuate a sale the exercise of a power of sale without such leave is not merely an "improper or irregular exercise of the power within section 5 (1) of the Conveyancing Act, 1911 (*a*). But if the mortgage was executed on or after January 1, 1926, it will have been noted that the purchaser then has an additional protection. His title is not impeachable (once he has completed) by reason only of the fact that the leave of the

(*a*) In cases where the sale was in fact effected, say, some twenty years ago, it may well be that the title may be considered good now owing to the lapse of time.

Court, where necessary, has not been obtained. Here, however, we must walk (and write) warily. As his title cannot be impeached after completion owing to the vendor mortgagee's failure to obtain the leave of the Court it has been suggested that his proper plan is to make no inquiry concerning leave if the mortgage was executed *after* December 31, 1925. In order to obtain protection under that Act it is necessary that the purchaser should be a *bona fide* purchaser without notice of any irregularity (not (*semble*) without notice of the fact that the leave of the Court was or might be necessary). Thus if the purchaser learned that the mortgagee, although admitting that leave was necessary, was not proposing to obtain such leave he could hardly be deemed to be a "*bona fide* purchaser without notice" of an intended irregularity. In that event he would not be protected. In the *Anchor Trust Case* (*supra*) Jessel, M.R., observed (at p. 820) that the purchasers by their inquiries and the answers thereto had ample notice that the mortgagee was not in a position to exercise her power of sale, and thus could not make a good title. Clearly that decision was correct. Moreover the mortgage, in that case, was created before January 1, 1926, and the provision in the Act of 1925 above noted did not apply. But it does apply to mortgages created after that date; and it seems that this point has been overlooked in certain quarters. Thus it is stated in the *Conveyancer's Year Book, 1940*, by Sir Lancelot H. Elphinstone, of "Prideaux" fame (at pp. 223 and 238), that the Law of Property Act, 1925, s. 104, will not protect a purchaser (even without notice) from a mortgagee selling in breach of the provisions of section 1 of the C. E. P. Act, 1939, or of section 7 of the Rent Act of 1920. The same view has been expressed elsewhere; but the writer has observed in that connection no reference to the fact that in the *Anchor Trust Co. Case* (which is stated as the authority for this view) :—

(i) Section 104 did not apply, and

(ii) The Court expressly decided that the purchasers by their inquiries and the answers thereto had learned that the mortgagee was not in a position to sell and could not make a good title, and were not *bona fide* purchasers for value without notice (see pp. 820, 821).

Mr. Lightwood, though not dealing fully with the *Anchor Trust Case*, has discussed it in the *Law Journal* (89 L. J. 101, 139, and 151). He notes that although it is enacted by section 104 of the L. P. Act, 1925, that a purchaser is not concerned to inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised, it is not stated in that section that a purchaser is not concerned to inquire

whether leave of the Court, when so required, has been obtained. Mr. Lightwood considers that the provision protecting a purchaser where leave of the Court has not been obtained may nevertheless be relied upon, unless the purchaser, by his own inquiries or otherwise, finds "that leave was not obtained" (89 L. J. 101). With this opinion the writer respectfully agrees. In expanding the words placed within quotation marks above, the writer thinks that he does no more than interpret Mr. Lightwood's meaning. The expansion suggested is "finds or ought to have found that leave was necessary *and* was not obtained". A purchaser may well learn that leave is necessary; but he may, it would seem, rely upon section 104 and make no inquiry. But suppose that the purchaser learns that leave was not obtained, the question then arises whether the purchaser has notice that leave was necessary. If he has no such notice it is abundantly clear that he is protected by section 104. If, however, the purchaser has once learned definitely that the leave of the Court has not been obtained, the only safe advice to the purchaser is that he should satisfy himself by making all necessary inquiries (and obtaining all necessary evidence in verification of replies) that such leave is not necessary, unless it is already clear from the facts or the documents that such leave is unnecessary. In this connection it may be mentioned that the purchaser must pay for the preparation of any statutory declaration which is required in order to show, for example, that the vendor was in possession or had appointed a receiver before the war (*Re Wright & Thompson's Contract*, [1920] 1 Ch. 191).

*Practice note.*

Moreover, in spite of the view here expressed the writer feels that in the normal case the abstract would show whether leave is or is not necessary. If it appeared to be necessary the writer would not be prepared to take the risk of putting his eyes in blinkers, and completing the purchase without seeing that the requisite leave of the Court was obtained. Those who feel otherwise should ponder over sub-section (ii) (a) of section 199 of the L. P. Act, 1925, and the cases on which that sub-section is based. Sub-section (3) of that section does not materially assist.

The acceptance of a title depending upon the view that a purchaser is not concerned to inquire whether leave has been granted, cannot, in fairness to the client, be recommended.

### RECOVERY OF POSSESSION.

Diverse views have been taken by county court Judges and others as to the necessity for obtaining leave to enforce an order

for possession by writ of possession or by taking possession personally (see *Harris* v. *Parkinson* (1939), L. J. N. C. C. R. 419, *Ashington U. D. C.* v. *Miller* (1940), L. J. N. C. C. R. 7, and *Trelfa* v. *Gerrard* (1940), L. J. N. C. C. R. 28). The following observations may assist in connection with the question of taking possession of mortgaged property pursuant to an order:—

Leave is necessary to proceed to execution upon:—

(a) A judgment or order (whatever the date thereof) for recovery of possession of land in default of payment of rent or for the recovery of possession of land by a mortgagee thereof by reason of a default in the payment of money (C. E. P. Act, 1939, s. 1 (3), as amended by section 2 of P. M. Act, 1939).

Thus it seems reasonably clear that if the mortgagee obtains an order for possession owing to non-payment of principal or interest he will need the leave of the Court before he puts the order into effect.

(b) References in paragraph (a) to judgments or orders for the recovery of possession apply to any judgment or order which enables a person to obtain possession of land, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of land (P. M. Act, 1939, s. 2 (2)).

(c) It appears to be deducible from the *dicta* in *S. & A. Services, Ltd.* v. *Dickson*, [1940] 3 All E. R. 98 (C. A.), that where the order for delivery of possession is by reason of a breach of the mortgagor's obligations other than the non-payment of money the leave of the Court to the execution of the judgment or order by writ of possession is unnecessary. And it would also seem likely that section 1 (1) of the C. E. P. Act, 1939, would not prevent the mortgagee from taking possession personally in such a case if it could be obtained by consent *after* an order for delivery of possession.

In *Temperance Building Society* v. *Nevitt*, Times newspaper, June 22, 1940, the Court of Appeal condemned severely the attempt made by a building society to obtain possession by treating the wife of a soldier mortgagor as a person unlawfully in possession, and suing her. Scott, L.J., pointed out that it was most probable that if anyone could be in lawful possession in such a case it was the mortgagor's wife. In any case the mortgagor should have been joined as a party.

Bankruptcy and Winding Up.

(1) A person entitled to the benefit of a judgment or order, who issues a bankruptcy notice or presents a bankruptcy petition or a winding-up petition founded on the non-payment of money due under that judgment or order is deemed to be "proceeding to the enforcement of" that judgment or order, within the meaning of sub-section (1) and sub-section (3) of section 1 of the C. E. P. Act, 1939 (see C. E. P. Act, 1939, s. 3 (b)). In cases where it would be necessary to obtain leave to enforce the judgment or order it is therefore necessary to obtain leave to issue a bankruptcy notice or bankruptcy or winding-up petition following such a judgment or order, but of course general leave to enforce the judgment or order will authorise the steps last mentioned.

And where a bankruptcy notice was served before the war, in a proper case, and the creditor obtained leave to enforce the judgment on which the notice was founded it was held that leave to present a bankruptcy petition was unnecessary (*Re a Debtor*, [1940] 1 Ch. 65).

(2) Not only is it necessary to obtain leave at the last-mentioned stage, but by section 1 (5) of the C. E. P. Act, 1939, after a bankruptcy or winding-up petition is presented on the ground that an individual or a company is unable to pay his or its debts, if the debtor or the company satisfies the Court that such inability is due to circumstances directly or indirectly attributable to the war, the Court may at any time stay the proceedings under the petition for such time and subject to such conditions as the Court thinks fit.

Thus, if a bankruptcy or winding-up petition has been presented before September 2, 1939, section 1 (5) would appear to apply to such a case (cf. *Re Silber*, [1915] 2 K. B. 317).

(3) What happens if a company has created a mortgage or debenture, and the mortgagees or debenture holders pursuant to a power contained in the debenture have appointed a receiver and the company then goes into liquidation? Bennett, J., had to consider this question in the case of *Re S. Brown & Son, etc., Ltd.*, [1940] 3 All E. R. 638. There, debenture holders had obtained the leave of the Court to appoint receivers who had power under the debenture, as the agents of the company, to manage and to sell. Later, the company went into liquidation. The result was to terminate the authority of the receivers to act as agents of the company: see *Gosling* v. *Gaskell*, [1897] A. C. 575. From that time, the receivers must, in the opinion of Bennett, J., be deemed to be the agents of the debenture holders. If, after the liquidation had commenced, the debenture holders wished to sell it was for them to apply for leave. As the company did not appear, Bennett, J.,

had no difficulty in making the order for which the debenture holders were applying, namely, leave to sell the mortgaged property (*b*).

Note, however, that where a power of attorney is given to the mortgagee to sell, etc., bankruptcy or liquidation will not terminate the power : L. P. Act, 1925, ss. 126 and 205 (1) (i).

(4) By section 110 of the L. P. Act, 1925, which applies to mortgages executed after December 31, 1925, it is provided that where the statutory or express power for a mortgagee either to sell or to appoint a receiver is made exercisable by reason of the mortgagor committing an act of bankruptcy or being adjudged a bankrupt such power shall not be exercised *only* on account of the act of bankruptcy or adjudication, without the leave of the Court. And by virtue of section 205 (1) (i) of the same Act " bankruptcy " includes liquidation by arrangement, and in relation to a corporation the winding-up thereof. It has been laid down that in such cases where the mortgagee desires to appoint a receiver he must apply for leave under the C. E. P. Act, 1939, and then if he gets such leave he must apply for leave under section 110 of the L. P. Act, 1925, before he can appoint a receiver in such cases (*Re Huddersfield Building Society*, [1940] 3 All E. R. 218). Bennett, J., observed that where an application is made for leave to exercise the mortgagee's powers under the mortgage deed, the Court does not [*i.e.*, normally] consider whether those powers have become exercisable. (As to a premature application under the C. E. P. Act, 1939, see *Re Royal Bank of Scotland*, *supra* (TIME FOR APPLICATION, etc.)

CONSENT OF MORTGAGOR.

It was held in *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co., Ltd.*, [1940] 2 All E. R. 601, that a mortgagor cannot validly authorise his mortgagee to exercise the remedies specified in section 1 (2) of the C. E. P. Act, 1939, so as to enable the mortgagee to proceed without the leave of the Court. In other words, the jurisdiction of the Court under that sub-section, and presumably its jurisdiction in all cases where leave is required under that Act, cannot be ousted by agreement between the parties. In an article in the *Law Times* (189 L. T., at p. 346) it appears to be suggested that notwithstanding the *Soho Square Case*, a mortgagee is not prejudiced if he effects a sale under the following conditions :—

(1) The mortgagor consents to the exercise of the power of sale;

(2) The mortgagor admits that his inability to pay the mortgage debt is not due, directly or indirectly, to the war.

(*b*) As to a sale by a receiver where the company is not in liquidation, see *Re Wood*, [1940] 4 All E. R. 306.

As to (1), it is reasonably clear that such a consent is null and void.

As to (2), it seems that such an admission is open to the same objection as a consent by the mortgagor. It is surely for the Court to determine, when the matter is brought before it, whether the inability of the mortgagor to pay the mortgage debt is in fact due to the war. The whole object of requiring that the leave of the Court shall be obtained is to enable that very question, and that question only, to be determined by the Court. Other ingenious devices are suggested, in the article now under discussion, in order to obviate the necessity of obtaining the leave of the Court, such as the appointment of the mortgagee as the attorney of the mortgagor to do the act required. When one considers that the original mortgage may well contain an *omnibus* power of attorney in favour of the mortgagee, it seems to follow that the Court would strain against the view that acts done pursuant to any such power or further *ad hoc* power of attorney are the exclusive acts of the mortgagor, any more than a conveyance by a mortgagee by virtue of a power of attorney in the mortgage would be anything but a realisation by him of his security (*c*).

And if the device chosen is ineffective it would seem that anything done thereunder would (as between the mortgagor and mortgagee) be void. Consequently, even if the purchaser acquires a good title, the mortgagor may require the mortgagee to pay over to him all moneys received as a result of his unauthorised act. Can he lawfully refuse to do so? It is not clear that the mortgagee could effectively plead a right of set-off. Presumably the debt would remain and the mortgagor would be entitled to such relief as might be appropriate under the C. E. P. Acts.

If the mortgagor is in fact complaisant, there would appear to be a safer method of carrying into effect a sale, namely, for the mortgagor himself to effect the assurance of the property, stating in the conveyance, or other assurance, that he had agreed to sell the property at the fixed price. Any contract made by the mortgagor with the object of effecting a sale would presumably be in normal form. The mortgagee would join in the conveyance in the usual way.

As to the exercise of other remedies of the mortgagee, it is possible that there may be exceptions; but in general it would seem that, short of leave of the Court, the only safe course would be the discharge of the original mortgage and the execution of a new one.

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(*c*) As to sales by receivers see an article by the present writer in L. J. 99, p. 215, and *Re Wood*, [1940] 4 All E. R. 306.

### Insurance Covenants.

The danger of an unlimited covenant to insure against fire (which appears to extend to fire caused by incendiary bombs) is well illustrated by the case of *Moorgate Estates, Ltd.* v. *Trower*, [1940] 1 All E. R. 195. See also *The Conveyancer*, Vol. 4, Part 3, pp. 250, 251. The mortgagor should see that his covenant to insure excludes insurance against war risks so long as such insurance cannot be effected with Lloyd's or the tariff insurance offices.

### Controlled Mortgages.

Having regard to the fact that most of the dwelling-houses in this country which are let are now subject to the Acts known generally as the Rent Acts it seems necessary to say something of the position of the mortgagor and the mortgagee in connection with mortgages of such dwelling-houses. There were, of course, many houses which were controlled when the Rent and Mortgage Interest Restrictions Act, 1939, came into force.

#### Position before the Act of 1939.

(1) The Rent Acts only applied to a mortgage of a controlled dwelling-house or houses (with or without other property) if such mortgage was created before July 2, 1920 (Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (4)).

(2) Those Acts did not, however, apply :—

(a) If the property was in the occupation of the mortgagor. Only a dwelling-house which is let is subject to the Rent Acts (*Schaffer* v. *Ross*, [1939] 4 All E. R. 363).

(b) If the mortgage comprised one or more controlled dwelling-houses and also other land and the rateable value of such house or houses was less than a tenth of the rateable value of the whole of the mortgaged land (*i.e.*, including the house) (Act of 1920, s. 12 (4) (a)).

(c) If the mortgage was by way of equitable charge only, *ibid.* The term "equitable charge" includes a charge which contains a declaration of trust in favour of the chargee with power for the mortgagee to appoint a new trustee and a power of attorney under which the legal estate can be vested in a purchaser (*L. C. & W. Bank* v. *Tompkins*, [1918] 1 K. B. 515). Moreover, the words "or otherwise" are to be given full scope and will include any other method of creating an equitable charge (*Jones* v. *Woodward* (1917), 116 L. T. 378). It is clear from both the last-mentioned cases that an

undertaking to execute a legal mortgage does not make a charge a legal as distinct from an equitable charge.

(3) In the case of mortgages to which the Acts applied there were certain restrictions affecting the enforcement of the security and the increase of the rate of interest as follows:—

*Enforcement of security.*

It was not lawful to call in the mortgage, to exercise the right of foreclosure or sale or otherwise to enforce the security or to sue for the principal money unless default had been made by the borrower in any one or more of the following matters :—

(a) Payment of all interest within twenty-one days after the due date for payment.

(b) Performance and observance of his covenants (except repayment of the principal money).

(c) The keeping of the property in a proper state of repair.

(d) The payment of all interest and instalments of principal recoverable under any prior encumbrance.

(Act of 1920, s. 7.)

However, this restriction of the lender's right to enforce the security did not apply to all mortgages of controlled houses. The exceptions were contained in the proviso to section 7 of the Act of 1920, and were as follows :—

(i) Any instalment mortgage where the principal money is repayable by instalments extending over a term of at least ten years from the creation of the mortgage.

(ii) Nor did this restriction prevent a mortgagee from exercising his power of sale if he was in possession on March 25, 1920.

(iii) The mortgagor could consent to the exercise by the mortgagee of the powers conferred by the mortgage.

(iv) In the case of a mortgage of a leasehold interest the county court might authorise the calling in and enforcement of the mortgage (whereupon section 7 would not apply). This the Court might do if satisfied that the mortgagee's security was seriously diminishing in value or was otherwise in jeopardy and that for that reason it was reasonable that the mortgage should be called in and enforced. However, any such order might be made subject to a condition avoiding it if the mortgagor within a specified time repaid such portion of the principal sum as appeared to the Court to correspond to the diminution of the security.

With regard to the operation of section 7 of the Act of 1920 and the relevant decisions the reader must be referred to the useful text-book of "Law Notes" on the Rent Acts (17th ed.), particularly at pp. 58—61 and p. 67 (not 66 as stated on p. 61). The writer gladly acknowledges his indebtedness to the editors of that work (including the 1939 Supplement), for the assistance which he has derived from it in preparing this section of the present article.

*Increase of rate of interest.*

(1) In the case of mortgages to which the Rent Acts applied the position as to increase of the rate of interest depends upon the standard rate, which according to section 12 (1) (b) of the 1920 Act means—

(a) If mortgage in force on August 3, 1914, the rate of interest payable at that date.

(b) If mortgage created after that date the original rate of interest.

Nothing is said in the Act as to what is the standard rate in the common case in which interest is payable at a lower rate if paid within a specified period after the due date for payment, and even after this lapse of time the point does not appear to have been decided by the Courts—or has it? Apparently there are varying opinions; but the writer sees no reason why the concession or discount allowed for prompt payment should prevent the permitted increase from being made in respect of *both* the higher and lower rates of interest. The rate of interest in such cases would properly be stated as "£X per cent. if not paid within [twenty-one] days, etc,, etc., or £Y per cent. if paid within [twenty-one] days". Each rate is a standard rate in this sense, and the increase permitted by the Act may be made in respect of both the rates—or so it is suggested. Quite possibly the Courts will hold otherwise!—although it seems plain that it was not the intention of the Act to penalise a mortgagee who has made provision for a varying rate of interest according to particular circumstances.

And what is the "original" rate of interest if a mortgage was created on, say, August 6, 1914, and provided for payment of interest at "£4 per cent. per annum for the first two quarters and thereafter £1 per cent. per annum above the Bank rate for the time being but never less than £4 per cent, per annum"? Must not regard be had to the whole of the formula "originally" provided for determining the rate of interest?

(2) What increase is permitted? This question is answered by section 4 of the 1920 Act. The increased rate may exceed the

standard rate by 1 per cent. per annum with a maximum of 6½ per cent. per annum.

(3) When can the increase be made? Here there is no certain answer. Section 3 of the 1920 Act enacts that nothing in the Act shall be taken to authorise any increase in the rate of interest on a mortgage except in respect of a period during which, but for that Act, the security could be enforced. (We have already stated above the restrictions upon the enforcement of mortgages of controlled property.) The editors of the *Law Notes* text-book on the Rent Acts, above mentioned, appear to be despondent of discovering any interpretation of this provision "which does not either unduly strain the language of the Act, or go far to render its provisions nugatory". It seems quite possible that such increases as are permitted by the Act can only be made with the consent of the mortgagor. It seems curious that after nearly twenty years, and the passing of several amending Acts, it is not known in what circumstances such increases can be made!

### Position since the Act of 1939.

*Restriction upon enforcement.*

It must be borne in mind that in this section we are dealing solely with the position which arises under the Rent Acts. The observations above concerning the effect of the other Emergency Acts apply equally to mortgages of controlled houses except as otherwise stated.

The provisions of section 12 (4) of the Act of 1920, *vide supra*, apply also to mortgages of houses brought into control by the Rent Act of 1939, subject as follows: Mortgages of such houses, if (or when) let, are "controlled" whether created *before or after* the coming into force of the Act of 1939, *i.e.*, the exclusion from control of mortgages of controlled houses created after the passing of the 1920 Act (July 2, 1920) has no application to houses which are only brought under control by the Act of 1939.

It would be out of place here to consider what is the standard rent of a 1939 or pre-1939 controlled house; but it should perhaps be mentioned that the houses brought into control by the 1939 Act are those (if or when let) of which the rateable value on "the appropriate day" did not exceed £100 if in the Metropolitan Police District (or the City), or £75 if outside that District. This includes many houses which had been decontrolled (*e.g.*, by vacant possession being obtained, or by reconstruction). As to dwelling-houses which are outside the Acts reference must be made to the 1939 Act. "The appropriate day" means as to the Administrative

County of London (not the Metropolitan Police District) April 6, 1939, and as to other areas April 1, 1939. (This is simply because the rating year runs from April 6 in the county of London and from April 1 in other counties.)

The position in connection with the sale by mortgagees of houses controlled by the Act of 1939 is as stated in the previous section, "POSITION BEFORE THE ACT OF 1939", subject as follows:

(1) The time at which a mortgagee must have been in possession, in order to sell without leave, will now be September 1, 1939.

(2) Although the mortgagor may consent to the sale by the mortgagee of the property (Act of 1920, s. 7 (proviso, *supra*)) and thus obviate any difficulty under the Rent Acts, such consent will not obviate the necessity for leave under the C. E. P. Act (see below). Any consent will be ineffective in relation to the leave required under that Act (*Soho Square Syndicate, Ltd.* v. *E. Pollard & Co., Ltd.*, [1940] 2 All E. R. 601).

(3) The standard rate of interest is as follows:—

(a) If the mortgage was created before September 2, 1939, the standard rate is the rate payable on September 1, 1939.

(b) If the mortgage was created on or after September 2, 1939, the standard rate is the rate originally payable under the mortgage.

Whatever the date of the mortgage, no increase of the standard rate of interest is permitted (Act of 1939, First Schedule).

### SERVICE ON MORTGAGOR.

There have been certain decisions in connection with difficulties arising out of the absence, on war service or otherwise, of mortgagors; but see now the Rules made under the C. E. P. Acts.

### MORTGAGES AND EVACUATION AREAS.

The Defence (Evacuated Areas) Regulations were made under the Emergency Powers (Defence) Acts, 1939 and 1940, on July 10, 1940, to afford a moratorium to persons living or carrying on business or formerly living or carrying on business in areas which have become evacuated, or having property or other interests in such areas (*a*).

(*a*) See also the article "The Defence (Evacuated Areas) Regulations, 1940", by L. A. Blundell, *ante*, p. 47.

*What is an evacuation area?*

Power is given by these Regulations to the Minister of Home Security to declare any part of a defence area (*b*) to be an evacuation area where it appears to him that by reason of the extent to which such part has been or is likely to be evacuated the Regulations ought to apply to it. Upon such declaration being made it becomes an evacuation area. The title "Evacuated Areas" (*vide supra*) is perhaps misleading, for there is no technical or special use of this term in the body of the Regulations.

*Identification of evacuation areas.*

For good reasons the areas to which these Regulations are applied from time to time are apparently not to be announced to the public. It is, however, understood that if a party who is proposing to institute proceedings (or his solicitor) makes inquiry of the Registrar of the county court for the area in which the mortgaged property is situate, he will be able to ascertain whether that area is an evacuation area within the meaning of these Regulations.

As it may be desired in some cases to take proceedings in the High Court, no doubt the High Court will be furnished with particulars of evacuation areas, and will be able to assist by pointing out that it will be useless to issue a writ during the "evacuation period", *i.e.*, moratorium period created by these Regulations.

*Evacuation period.*

In relation to any unoccupied premises the "evacuation period" means the period between

(a) the date of the order declaring the area to be an evacuation area *or* the date when the premises became unoccupied (whichever is the later date) and

(b) a date to be fixed by order of the Minister of Home Security (Regulation 2 (1) (a)). Presumably the evacuation period will continue for more or less the same period as the area in which the premises are situate remains an evacuation area.

*Ambit of the Regulations.*

The Regulations afford relief not only in respect of mortgage debts but also in respect of rent, rates and other local debts (including hire and hire-purchase payments). See article, p. 47.

(*b*) Apparently the whole of Great Britain is now a defence area: see p. 47.

(1) *Effect of the Regulations on Mortgages.*

Subject to the important provisos mentioned below, no sum secured or charged on any premises in an evacuation area is recoverable during the evacuation period if those premises are unoccupied when that area becomes an evacuation area or subsequently become unoccupied. And no remedy arising in consequence of a default in the payment of any such sum is enforceable (whether by proceedings in any Court or otherwise) during the evacuation period (Regulation 4 (1)).

It is clear that this provision applies to interest as well as capital sums secured by mortgage or charge.

(2) *Provisos.*

The moratorium mentioned in the foregoing paragraph (1) does not apply to :—

(a) Any sum payable under a mortgage or charge entered into after July 10, 1940.

(b) Any sum accrued due and payable before the commencement of the evacuation period. As to capital sums the position is, however, qualified as stated in paragraph (3) below.

(See regulation 4 (1), proviso.)

Broadly speaking, the Regulations do not affect proceedings in respect of pre-existing liabilities but only hold up proceedings in respect of liabilities which accrue or are "deemed" to accrue *during* the evacuation period.

(3) *When is capital "due and payable" for this purpose.*

(i) Where the capital is not repayable by instalments it is not to be deemed to have accrued due and payable unless and until a written demand for payment has been served on the person liable and a period of three months, or such longer period as may have been specified in the demand, has elapsed since the service of the demand (paragraph 4 (2) (b)). Thus the area in which mortgaged premises are situate is declared to be an evacuation area on July 17, 1940. On July 24, 1940, the mortgaged premises become unoccupied, and the evacuation period then commences. If no written demand has been made the capital sum has not accrued due and payable before the commencement of the evacuation period. The Regulations will therefore apply. If, however, written demand for payment of the capital sum was made on, say, April 20, 1940, the three months' period will have elapsed when the evacuation period commences, and the Regulations will not apply. Of course, if the mortgage was made before the Courts (Emergency Powers)

Act, 1939, came into force, the provisions of that Act as amended by the C. E. P. Act, 1940, will be available for the protection of the mortgagor. (And see also the provisions of Regulation 6, *infra*.)

Moreover, it will be remembered that, subject to the exceptions above noted, in the case of mortgages made before September 3, 1939, the mortgagee is not entitled to obtain possession of the land unless

(a) default has been made for upwards of three months in complying with a written demand for payment of the capital sum secured by the mortgage, or

(b) some interest is in arrear (whether demanded or not) or there has been a breach of some obligation arising under or by virtue of the mortgage apart from the obligation to pay the capital sum or interest thereon.

**(P. M. Act, 1939, s. 1.)**

Both in cases where these Regulations apply and in cases where section 1 of the P. M. Act, 1939, applies, it appears that the mortgagee is, to some extent, in a better position if he happens to have served a written demand for payment of the mortgage moneys prior to the date on which the P. M. Act, 1939, or the Regulations, came into force. It is not clear that this result is logical in its application to all types of case. Thus, where a mortgage was payable on demand the mortgagee may have served a demand for payment many months before the commencement of the war, rather for the purpose of enabling him to exercise his remedies speedily in case of need than in the expectation of payment. The mortgage may well have provided that upon default by the borrower in repaying the capital sum within, say, one month from the date of the demand the mortgagee's power of (*inter alia*) taking possession was to be exercisable forthwith. In such a case it would seem that neither these Regulations nor the P. M. Act, 1940, will assist the borrower.

On the other hand, if the mortgagee has been content to defer the service of the notice because it would apparently be possible to exercise all his remedies within one month after the notice was served, it appears that he will now suffer for his leniency. Both in the Regulations, paragraph 4 (2), and in section 1 of the P. M. Act, 1939, the phrase "has been served" is employed, and it does not appear to matter whether the notice is served before or after any particular date. If it has expired at the material date so much the better for the mortgagee.

(ii) Where the capital sum is payable by instalments it will have been noted that the P. M. Act, 1939, does not apply at all.

However, the Regulations deal with the matter in another way. There is no necessity to give any notice requiring the payment of the instalment. The effect of paragraph 4 (2) (a) of the Regulations is that any instalment or instalments due and payable *before* the beginning of the evacuation period will still be recoverable and all remedies arising in consequence of the default in payment of such instalment or instalments are still enforceable, subject to the C. E. P. Acts, the P. M. Act, 1939, *and* to paragraph 6 of the Regulations (*vide infra*). Instalments falling due during the evacuation period are not recoverable during that period.

*What are "unoccupied" premises.*

Although there is no direct definition of "occupation", premises are deemed to be unoccupied if requisitioned by the Government and no premises are deemed to be occupied merely by reason of the presence in them of goods or furniture. (See article, p. 47.)

*Power to waive or modify the Regulations.*

In certain cases the Court may make an order removing or modifying the restrictions imposed by the Regulations as it may think just, and may apportion any part of the liability to any period or to any premises or goods (regulation 4 (4)).

These cases are as follows :—

(i) In the case of unoccupied premises where the person entitled to possession of those premises has at any time since the commencement of the evacuation period resided in the area; *i.e.*, in the evacuation area, and not necessarily in the premises in question.

(ii) Whether the premises are unoccupied or not, where the mortgagor or any other person with his consent has enjoyed a substantial benefit from the premises since the commencement of the evacuation period; or in the case of any sum payable in respect of a period commencing before the evacuation period, since the commencement of the earlier period.

(iii) Whether the premises are unoccupied or not, where the mortgage relates also to property other than premises or goods to which paragraph (1) of regulation 4 applies. (That paragraph applies not only to unoccupied premises but also to goods on hire or hire-purchase to a person who, in the case of goods used solely for the purpose of a business (including a trade or profession), has ceased to carry on business in the evacuation area or, in any other case, has

ceased to reside in such area (Regulation 4 (1), paragraph (b)). Paragraph (1) of Regulation 4 only applies if the goods or part of them were in the area at the commencement of the evacuation period and have not been removed from such area by or on behalf of the hirer before the date on which the sum first accrued due and payable).

In such cases the Court may apportion any part of the liability to any period or to any premises or goods.

*Position of guarantors, etc.*

By Regulation 4 (3) no liability is to arise during the evacuation period under any contract of guarantee, indemnity or insurance entered into before July 10, 1940, by reason of a default in payment of any sum to which the moratorium applies. This paragraph differs from paragraph (1), which states that no sum "shall be recoverable during the evacuation period". If the liability of the guarantor does not arise (as distinct from being postponed), it is not clear under what principle of law it can, in general, "arise" at a later date. However, it can hardly have been the intention to release the guarantor whilst merely postponing the liability of the principal debtor. Moreover, if nothing is recoverable from the principal the statement that no liability shall arise under the guarantee may perhaps be taken as merely declaratory of the legal position, and not as altering it. Nevertheless the wording seems unfortunate, and may lead to argument.

*Regulation 6—extension of Courts (Emergency Powers) Act, 1939.*

Not only do the Regulations place an embargo upon proceedings during the evacuation period, but where a mortgage was made after September 3, 1939, and before July 10, 1940, and the mortgagor shows that by reason of his being affected by the evacuation the mortgagor is unable to pay any sum due under the mortgage immediately, the Court can grant an injunction restraining the exercise of any remedy mentioned in section 1 (2) (a) of the C. E. P. Act, 1939 (*vide supra*), and also restraining proceedings for foreclosure or sale or for the recovery of possession of the mortgaged property (Regulation 6 (2)). Similarly if an order is or has been made for the payment of the mortgage money or of any interest the Court may exercise its powers under the C. E. P. Act, 1939 (as amended by the C. E. P. Act, 1940, or any subsequent enactment), as if the mortgage had been made before September 3, 1939 (Regulation 6 (1)). In this connection the term "affected by the evacuation" means affected directly or indirectly by

(a) The evacuation of an evacuation area or by the provisions of the Regulations in their application to such an area (Regulation 6 (1) (a)). Thus, A may be unable to pay B because he cannot force his debtor C to pay him during the evacuation period (C being protected by the Regulations); or

(b) The evacuation of any premises in pursuance of advice given by or on behalf of any Government Department (Regulation 6 (1) (a)). The important point to be noted here is that this paragraph relates to any premises wherever situate. It is not necessary that they should be within an area declared to be an evacuation area.

(c) Any order made under Regulation 16A or 21 of the Defence (General) Regulations, 1939, requiring the removal of animals from any area.

*Rules.*

Regulation 7 provides for the making of Rules for the purposes of the Act. Such Rules have now been made (see Courts (Emergency Powers) (Evacuated Areas) Rules, 1940, dated August 3, 1940). See article, *post*, p. 47.

### War Damage.

On this question generally see the *Law Journal*, November 16, 1940, "Mortgages and War Damage", p. 193.

Surprisingly, the only Emergency Act which appears to deal with war damage in connection with mortgages of land is the Landlord and Tenant (War Damage) Act, 1939. By section 2 of that Act the mortgagor, if under an obligation to repair—and he generally is—must give written notice to the mortgagee as soon as is practicable after any war damage occurs to the property, and must allow the mortgagee or his agent to enter to inspect the damage and to make it good, permanently or temporarily. If the mortgagor fails to give the requisite notice such failure will not enable the mortgagee to enforce any right or remedy arising out of failure unless the Court gives leave (*ibid.*).

The Act is silent as to whether the expenses of repairs can be added to the mortgage moneys. Presumably they can; but whether, or upon what principle, interest upon such expenditure can be claimed (particularly by a mortgagee who is not in possession) is not clear (cf. *Shepard* v. *Jones* (1882), 21 Ch. D. 469; *Marshall* v. *Cave* (1824), 3 L. J. (o.s.) Ch. 57 (mortgagee

in possession). However, mortgages very often contain a clause which authorises the mortgagee to effect repairs and to receive interest upon the amount thus expended.

The mortgagor cannot be required to make good war damage (*ibid.*, s. 1).

## NOTES OF RECENT CASES.

### 1. *CONVEYANCING AND REAL PROPERTY CASES.*

*Mortgage—practice—adjournment of summons for possession.*—*Hinckley and South Leicestershire Permanent Building Society* v. *Freeman*, [1940] 4 All E. R. 212 decided a practice point of importance. On a summons for possession of mortgaged land the Master refused to make an order and adjourned the proceedings for three months with liberty before that date to apply if the current instalments were not paid during that time. The plaintiffs adjourned the case before the Judge and argued that the Master had no power to adjourn the proceedings but must make or refuse the order for possession as asked. Farwell, J., held that in a proper case there was no doubt that the Master had power to adjourn the proceedings. The power is to be exercised on proper grounds after consideration of which the Court is of opinion that the best course is to adjourn the proceedings for a definite time.

*Contract for sale—notice of forfeiture of deposit—emergency legislation.*—It has now been held that it is not necessary to obtain leave before serving a notice of forfeiture of deposit under a contract for sale in respect of non-completion by the purchaser: *O'Hara* v. *Lipman*, [1940] 4 All E. R. 223. The learned Judge expressly left open the question whether the vendor could, on failure to comply with the forfeiture, then treat the money as his own without any application under the Emergency Powers Act. One of the points on which the learned Judge based his decision was that a notice of forfeiture is not automatically followed by forfeiture because the purchaser might complete the purchase. This makes a distinct difference between subsequently treating the money as the vendor's own. The Emergency Powers Act is not confined to remedies exercised by proceedings in Court, because it

has been held that a mortgagee cannot appoint a receiver out of Court without leave: *Soho, etc. Ltd.* v. *Pollard*, [1940] Ch. 638; *Broadstairs Picture House, Ltd.* v. *Littman*, 109 L. J. Ch. 443 (noted *ante*, Vol. 4, p. 433), is distinguishable because there the learned Judge held that forfeiture of deposit under failure to comply with an order for specific performance was not made under the contract but in respect of contempt for failure to comply with the order of the Court.

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*Settled land—order for trustees to exercise the powers of a tenant for life.*—Under the Settled Land Act, 1925, s. 24, where an estate owner under the Act has parted with the whole of his interest in the settled land and consents to an order or unreasonably refuses to exercise his powers, the Court can make an order that the powers shall be exercised by the trustees in his name. In *Re Thornhill*, [1940] 4 All E. R. 83 (affirmed by Court of Appeal—see note in [1940] 4 All E. R. 249) this question was raised. The tenant for life, who had been adjudicated bankrupt, had allowed the premises to fall into disrepair and some of the land to become almost derelict. Evidence was brought to show that the tenant for life had refused certain offers to take the land as tenants and improve it, and also refused to negotiate with the War Office with regard to part of the property. Bennett, J., held on the evidence before him that there was an unreasonable refusal by the tenant for life and he would authorise the exercise by the trustees of the settlement of some of the powers of the tenant for life but not including the power of sale. The case lays down no real principle, and is of interest primarily to show that even in very strong cases the Court will only authorise a limited exercise of the powers and that it is a question of fact in each case.

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*Trustee—appointment of new trustee by an infant.—Re Parson's Settlement*, [1940] 4 All E. R. 65, deals with a question on which there was no direct authority, namely, the appointment of a new trustee by an infant under an express power to appoint. The case should be read, because it is submitted that it is not an authority for the proposition that such an appointment cannot validly be made, though in the particular circumstances it was held to be invalid. In the case noted the infant had appointed as sole trustee his mother who was authorised to receive the income on behalf of the

infant until he attained twenty-five. The learned Judge held that it was not a power collateral or in gross which could be exercised under the principle in *Re D'Angibau* (1879), 15 Ch. D. 228, because it was a power to appoint to an office which might vitally affect the infant's beneficial interest. The power to appoint having been conferred on the infant in succession to his father and when the infant was a few months old, was held not to be exercisable by virtue of the intention of the settlor under *Re Cardross's Settlement*, 7 Ch. D. 728, because that intention was not apparent on the face of the settlement. The learned Judge was, therefore, driven back to first principles and his conclusions appear to be (at pp. 70, 71) that an infant can lawfully do (a) what by law he is bound to do, (b) what is for his benefit, and (c) what is for the benefit of others and does not prejudice himself. On the facts of the case before him the learned Judge held that it was an imprudent act to appoint a single trustee of such a fund as that involved, whoever he or she might be, but furthermore it would be imprudent to appoint the particular person because she need account to nobody and must often find herself in a position in which there must be a conflict between her interest and her duty. In executing the authority entrusted to him by the settlement the infant was touching his interest. Consequently the appointment was invalid.

It will be seen from this analysis of the case that it does not decide that an infant can never validly make an appointment of a new trustee. Indeed the case lends some support to the view that there might be cases in which such an appointment would be valid. It is, however, not likely that in practice sueh cases will be common. The case noted was clearly one of the more unlikely cases in which such an appointment would be good, if it could be questioned at all, because it was of a sole trustee whose interest and duty could conflict. A more likely example to give rise to question would be the additional appointment of a new trustee of settled land. It must, however, be remembered that trustees of settled land have the property vested in them during the minority of a tenant for life. It is felt that without further authority the matter remains in doubt.

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*Appointment of new trustee—trustee unwilling to retire—jurisdiction of Court.—Re Henderson*, [1940] Ch. 764, arose out of not usual facts, but may be explanatory of section 41 of the Trustee Act, 1925, whereby the Court has power to appoint a new trustee either in substitution for or addition to existing trustees whenever it is expedient, and it is inexpedient, difficult or impracticable to

do so without the assistance of the Court. Here a mother and daughter were co-trustees for the mother for life and subject to her interest the daughter was interested in the remainder. Disputes having arisen between the mother and daughter concerning the administration of the trust the mother agreed to retire in favour of the Public Trustee. When, however, it became apparent that the administration would continue to be in the same hands the mother refused to retire unless the Public Trustee took up the administration of the trust and out of the hands of the existing solicitors. Bennett, J., held that this refusal was unreasonable in the circumstances and the Court had power under section 41 of the Trustee Act to remove the mother from her trusteeship and to appoint the Public Trustee without imposing any conditions concerning the administration of the trust. In his view the appointment of the Public Trustee was sufficient to suppose that there would be independent administration.

Obviously each case must depend on its particular merits, but it becomes clear that it may be expedient to remove a trustee without proving that the trustee has been guilty of improper conduct in the administration of the trust.

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*Settlement—protected life interest—sequestration order.—Re Baring's Sett. Trusts*, [1940] Ch. 737, apart from the actual decision, must be noted for the careful and thorough survey by the learned Judge of the cases in which a life interest determinable on the income becoming payable to some other person will cease on an order of the Court. In the case noted the life tenant had a sequestration order made against her by the Court for failure to bring her children within the jurisdiction. Notice of the order was given to the trustees of the fund, but the trustees did not in fact pay any money to the sequestrators. The order was subsequently revoked and the trustees asked whether it had determined the life interest. Morton, J., held that the effect of the order for sequestration was to cause the income to become payable to some other person and so from the date of the order the life interest was determined. His view was based upon the construction of the settlor's intention, which was that he intended that there should be a continuous benefit either to the life tenant or to the beneficiaries under the discretionary trust. The effect of the sequestration order was to deprive the life tenant, at least temporarily, of the income of the property and hence the gift over became operative. This ground is a useful test for determining the question

where the gift over is dependent upon the income becoming payable to some other person.

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*Words of limitation—rectification.—Banks* v. *Ripley*, [1940] Ch. 719, should be carefully considered on the important point which may arise from lack of proper words of limitation. In this case a marriage settlement executed in 1873 had contained a gift over in default of appointment in favour of the children in equal shares or, if only one, of such only child, but no words of limitation were contained in the grant. Application was made to the Court to rectify the settlement so that the gift should read to the children and their heirs in equal shares, etc. The case involved two points. First, whether in the absence of any other evidence the Court had jurisdiction to rectify the settlement on the evidence afforded simply by a perusal of the document itself and, secondly, whether this particular document showed such evidence as would justify rectification. Morton, J., held that the Court had such jurisdiction following the decision in *Uvedale* v. *Halfpenny*, 2 P. Wms. 151, the only English authority on the point, and, secondly, that the terms of this settlement were such as to justify the rectification asked for. In support of the proposition counsel also relied on two Irish and much more recent cases: *Fitzgerald* v. *Fitzgerald*, [1902] 1 Ir. R. 477; *Re Davis' Estate*, [1912] 1 Ir. R. 516.

The importance of this decision, which in a large measure, of course, concerns only the particular limitation, is its relation to *Re Bostock's Settlement*, [1921] 2 Ch. 469, which was closely examined by the learned Judge. In that case a limitation of an equity of redemption by way of settlement to trustees in fee simple with an ultimate limitation in trust for children without words of limitation was before the Court of Appeal. The Court of Appeal held that as the trusts were perfected and the document no longer executory the children took only life interests. In the judgments there were expressions showing that the learned Judges had no doubt that an interest in fee simple had been intended to be created, and upon these Morton, J., placed reliance, but he distinguished the case because it was not an application for rectification. A dictum of Younger, L.J., (at p. 488) to the effect that there was no basis for reforming or rectifying the settlement in *Re Bostock's Settlement* (*supra*) was not read by the learned Judge as meaning that if an action for rectification had been brought and if the Court was satisfied on the evidence afforded by the document the Court would be precluded from rectifying the document.

*Re Bostock's Settlement* (*supra*) still states the law apart from

any claim to rectification. The absence of appropriate words of limitation whether the estates are legal or equitable will, where such words are required, be fatal no matter how clear the intention of the parties. Consequently a purchaser can never accept such a document on the title. On the other hand parties interested under the document may be able, by taking the appropriate proceedings, to obtain rectification of the document and so put their title in order, even though the only evidence of intention that is forthcoming is that based on the document itself.

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## 2. *LANDLORD AND TENANT CASES.*

By Lionel A. Blundell, ll.m., Barrister-at-Law.

*Service flats—"rateable value" and "rent"—deductions in respect of cost of services supplied by landlord.*—Where "service flats" are let at a rental inclusive of the services and facilities provided by the landlord, the combination of compensation for the use of the land with remuneration for the services is apt to produce difficulties as to what in truth is the rateable value and the "rent" in respect of the premises.

*Bell Property Trust, Ltd.* v. *Hampstead Borough Assessment Committee*, [1940] 3 All E. R. 640; 57 T. L. R. 10, was a rating case, but its importance in relation to service flats is such that it may profitably be considered here and viewed in relation to the law applicable to the rent in such a case. In this case it was held by the Court of Appeal that for the purpose of determining the gross value of a block of service flats, in respect of which the landlord was rated under a compounding agreement, certain costs could be deducted from the gross rents of the flats. Of the deductions claimed by the landlord the following were allowed by the Court of Appeal: (a) the cost of repairing and maintaining the passages, stairways, lifts, staff rooms and ornamental grounds; (b) depreciation of plant, machinery, boilers, refrigerators, wirelesses and of the portions of the building used to house such installations; (c) the cost of managing and supervising the services provided; (d) unproductive expenditure by reason of vacant flats; (e) 25 per cent. of the annual cost of the services by way of profit.

The principle applied by the Court of Appeal may be taken from a passage in the judgment of the Court delivered by Goddard, L.J.,

57 T. L. R. 12, where he says: " . . . It appears that not only the rating surveyors and the assessment committee, but also quarter sessions, approached the problem correctly. They set out to find what proportion of the sums reserved by the leases as rent represented the value of the services and amenities provided by the lessors, and, when they deducted that and the rates, the balance left represented the true gross value." The more detailed points of rating law which arose for consideration in *Bell Property Trust, Ltd.* v. *Hampstead Borough Assessment Committee* need not be gone into here. The broad principle which it is desired to emphasise is that in rating cases it is the " gross value " or " net annual value " which has to be determined, and this case provides an illustration of the principle that the cost of maintaining the services stipulated for in a lease of a service flat is to be deducted from a rent which is inclusive of the charge for services for the purpose of determining the gross value of the premises. Thus the case is in fact a detailed application to the case of a service flat of the definition of " gross value " in the Rating Acts (see Rating and Valuation Act, 1925, s. 68 (1)).

Practitioners have sometimes considered whether some similar deduction cannot be made from an inclusive rental in order to determine the true " rent " of a service flat. Service flats may not always be excluded from the operation of the Rent Restrictions Acts, despite s. 12 (2) of the Act of 1920, and section 3 (2) of the Act of 1939, which exclude a dwelling *bona fide* let at a rent which includes payment in respect of board, attendance, or use of furniture. The decisions on what is " attendance " are, it is thought, somewhat out of touch with the modern mode of life in flats: see, for example *King* v. *Millen*, [1922] 2 K. B. 647, distinguishing *Nye* v. *Davis*, [1922] 2 K. B. 56; *Wood* v. *Carwardine*, [1923] 2 K. B. 185. The result is that in many cases the rent attributable to the services which do constitute attendance may not form " a substantial portion of the whole rent " within section 10 of the Act of 1923. In such a case the service flat, if in other respects falling within the ambit of the Rent Restrictions Acts, will be a controlled dwelling-house.

Now this raises a question as to what is the standard rent. Under the Rent Restrictions Acts the standard rent is the rent at which the dwelling-house *was let* on August 3, 1914, or on September 1, 1939, as the case may be. So in the case of a service flat brought under control by the Act of 1939 one has to consider what was the rent at which the dwelling-house *was let* on September 1, 1939. Now although rent is a compensation for the possession during the term (see *Woodfall* (24th ed.), p. 303), in contemplation

of law the whole amount reserved as rent issues out of the realty and is distrainable as rent although the amount agreed to be paid may be an advanced rental on account of the provision of furniture by the landlord: see *Newman* v. *Anderton* (1806), 2 B. & P. N. R. 224; *Munster and Leinster Bank* v. *Hollinshead*, [1930] Ir. R. 187 (Sup. Ct.); *Woodfall* (24th ed.), p. 372. Clearly the same principle must apply where the cause of the rent being larger than it would otherwise have been is the agreement by the landlord to provide, not furniture, but certain specified services. The whole contractual rent reserved in respect of the service flat, without deductions in respect of the cost of providing the services, is the "rent" at which the flat is let, and therefore in deciding the amount of the standard rent no such allowances can be made as were permitted in *Bell Property Trust, Ltd.* v. *Hampstead Borough Assessment Committee* in relation to the rateable value. In considering the rent caution must be exercised in referring to rating cases which sometimes use the expression "true rent" to refer to that part of the rent which from the valuation point of view is reserved in respect of the occupation of the land.

The case of *Rousou* v. *Photi*, [1940] 56 T. L. R. 685, noted in *The Conveyancer*, vol. 4, p. 435, affords an interesting analogy, and confirms the proposition stated above as to what is the "rent" at which a dwelling-house is let. In that case the Court of Appeal held that "rent" within section 2 of the Housing Act, 1936, means the actual contractual rent agreed to be paid by the tenant, whether inclusive of rates or not. And the reasoning of Sir Wilfrid Greene, M.R., in delivering the judgment of the Court in that case, is closely applicable to the definition of "standard rent" in the Rent Restrictions Acts.

Space does not permit of a full investigation here into all the consequences which flow from the standard rent being inclusive of the charge for services. One important point, however, calls for special mention. The tendency at present is for the cost of such services as central heating, lighting, hot water and others which are commonly stipulated for, to rise owing to war-time conditions. The Rent Restrictions Acts contain no machinery for enabling an increase of rent on account of such a rise in costs, and in consequence the landlord's remedy seems to lie in determining the agreement whereunder the inclusive rent is paid (upon such date, if any, as the agreement can by its terms be determined) and offering to substitute therefor a new agreement for a tenancy at a rent not inclusive of the charge for the services provided. Of course the new terms must be made on the whole equally favourable to the tenant in order to comply with section 2 (3) of the

Act of 1920. The payment in respect of services can then by proper drafting be made separate from the rent and subject to a provision for variation free from the restrictions of the Rent Restrictions Acts.

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## 3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

*Administration—annuities and pecuniary legacies—direction to set aside a fund—gift over of fund after cesser of annuity—deficiency of assets—abatement.*—When the estate of a testator is not sufficient both to pay in full any pecuniary legacies bequeathed by his will and to provide a fund adequate to produce from its *income* any annuities prescribed by the will, the general rule of administration requires such annuities to be estimated at their actuarial capitalised value. If the assets are sufficient, on this basis, to satisfy both the annuities and the pecuniary legacies in full, each annuitant is then paid the appropriate capital sum outright. If, however, the assets are insufficient, the pecuniary legacies and annuities abate rateably —the latter upon their capital values ascertained as above. This general rule of administration is of course displaced if inconsistent with the intentions of the testator as indicated by his will. Among the many recent decisions upon this type of case, several have raised the question whether the general rule should be applied when the will directs a fund to be set aside sufficient to produce the annuity from its income (with or without a power to augment the income by resorting to capital) and further directs that this fund (or what is left of it) be paid, on the death of the annuitant, to X. Among these is *Re Nicholson*, [1938] 3 All E. R. 270 (noted *ante*, Vol. 3, pp. 99—100), in which Crossman, J., held that the actuarial value of the annuity should *not* be taken in such a case and paid over (abated if need be) to the annuitant, since this would entirely destroy the gift over to X. Instead, the fund which the will had directed to be set aside was here taken as the basis of the calculation, to abate rateably with the pecuniary legacies: the income from this abated fund would then be used (augmented by the capital as prescribed by the will in that case) as the source for the annual payments to the annuitant; and thereby the right of X to take the fund (or what would remain of it) at the death of the annuitant was preserved. In *Re Farmer*, [1939] Ch. 573 (noted *ante*, Vol. 3, pp. 345—347), however, where the facts were similar, Farwell, J., directed that the general rule of administra-

tion was not ousted by the fact that the will contained a gift over to X of the capital fund; accordingly, in that case, the annuitant took at once the actuarial value of his annuity, and presumably the gift over to X completely failed. A third case of this type has now come before Bennett, J., in *Re Wilson, Hurtley* v. *Marie Curie Hospital*, [1940] W. N. 306; [1940] 4 All E. R. 57. Here the learned Judge decided to follow *Re Farmer, supra*, rather than *Re Nicholson, supra*, the opening words of his judgment emphasising the importance of certainty in the rules to be applied in the administration of deceaseds' estates. Even, however, if the system adopted in *Re Nicholson* should now be regarded as anomalous, there remain a number of other decisions in which Judges have declined to follow the general rule of administration, in deference to indications of a contrary intention in the testator's will. *Re de Chassiron*, [1939] Ch. 934, and *Re Carew*, [1939] Ch. 794, are recent illustrations (noted *ante*, Vol. 4, pp. 97—99); but Bennett, J., was satisfied that these decisions were distinguishable from the case before him. It is perhaps worthy of note, however, that in *Re Carew* Simonds, J., adopted a plan for preserving the rights of X very similar to that which was employed in *Re Nicholson*.

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*Administration—share of residue—appropriate date for valuation.*—When personal representatives are proceeding to distribute a testator's estate in shares prescribed by his will, it may be necessary to value the various items of the estate in order to achieve the prescribed division. In such cases, the fact that values may alter between the date of the testator's death and the date of distribution raises the question as to the date at which such values should be taken. In *Re Gunther's Will Trusts*, [1939] Ch. 985 (noted *ante*, Vol. 4, p. 101), such a problem arose in relation to the valuation of a share of residue in order to assess the effect thereon of a hotchpot clause. There Farwell, J., formulated a general rule of administration whereby, in the absence of a contrary intention in the will, the values should ordinarily be taken as at the date of the testator's death: to value at the date of actual distribution might operate unfairly upon the parties, since their respective rights would then depend upon the energies of the executors. This decision has now been followed by Bennett, J., in *Re Oram, Oram* v. *Oram*, [1940] W. N. 314; [1940] 4 All E. R. 161, where it was necessary to value the residue in order to comply with a direction in the will that it be so divided that the value of A's share should exceed that of the share of B "by

exactly £30,000 ". For some unexplained reason no final division of the estate had yet been made, although the testator had been dead for more than three years. Had the provisions of the will been such as to necessitate a substantial interval of time between death and distribution, it would seem that the learned Judge would have been inclined to see in this an indication that the will intended a valuation at the date of distribution. *Re Wills*, [1939] Ch. 705 (noted *ante*, Vol. 3, p. 440), was distinguished on this ground. There, where a valuation was necessary both for the purposes of a hotchpot clause and in order to observe a direction that certain shares of residue should be three times as great as certain others, the prescribed shares of residue were contingent; in that case, therefore, the implication from the judgment of Simonds, J. (who was primarily concerned with the division of the income of the estate), that any appropriations of capital should be valued as at the date of appropriation, may be explained on the ground that the provisions of the will in that case were such as to cause distribution to be delayed. In *Re Oram*, however, the position differed, in that the will was held to intend the distribution to take effect at the testator's death.

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*Construction—bequest of " all my . . . horses "—whether horses owned in common with another are included—admissibility of extrinsic evidence to displace primary meaning.*—A curious point arose in *Re Sykes, Skelton and Dyson* v. *Sykes*, [1940] 4 All E. R. 10. At the time of making his will, the testator and his wife owned in common in equal shares three racehorses. His will contained a bequest to his wife absolutely of various kinds of chattels, described under some fifty designations, concluding with " all other articles of personal domestic or household use or ornament "; and this list included, *inter alia*, " all my . . . horses ". Bennett, J., held that the bequest did not include the testator's interest in the three racehorses, although evidence was available that the testator owned no other horse or horses of any description. The principles of construction involved in this decision are, first, that the ordinary or primary meaning of the words employed must be sought; and, second, that it is not permissible to seek for them some secondary meaning unless either the context in the will shows that they were not used in their primary sense or it is found that the words in their primary meaning are insensible when applied to the extrinsic circumstances. These principles, taken from *Wigram on Extrinsic Evidence*, were applied by Joyce, J., in *Re Glassington*, [1906]

2 Ch. 305. There a devise of "real estate" (the testatrix having none) was held to carry the beneficial interest which the testatrix had in real estate held by trustees for sale. In reaching this decision, Joyce, J., emphasised that the words of that will, in their context, indicated that the testatrix was plainly intending to refer to some "real estate" which she thought she then had. Accordingly, when it became apparent, on applying them to the extrinsic circumstances, that in fact she had no "real estate" in the strict sense, the primary meaning of those words became insensible; thereupon the Court became entitled to look further into the extrinsic circumstances for some secondary meaning of which the words were capable and in which they would operate sensibly in relation to the facts. Only by this process did it become possible to construe the phrase "real estate" as signifying the interest which, to her knowledge at the time of the will, she had in the real estate held upon trust for sale. In *Re Sykes*, *supra*, it was hardly possible to argue that the gift of "all my . . . horses", part of a long omnibus clause describing various types of chattels, indicated in its context that the testator had particularly in mind, when he made the will, certain specific horses which then belonged to him. Consequently, it was not possible to hold that those words were insensible when applied to the extrinsic circumstance that he did not, in strict fact, own any horses at all.

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*Construction — option to purchase given by will — whether personal to donee.*—In *Re Sykes*, *Younghouse* v. *Sykes*, [1940] W. N. 336; [1940] 4 All E. R. 122, the Court of Appeal has, by a majority, affirmed on other grounds the decision of Bennett, J., noted *ante*, pp. 74—75. The Court held unanimously that there is no rule of construction to the effect that an option given by a will is *prima facie* personal to the party to whom it is given, and that the judgments of the Court of Appeal in *Re Cousins* (1885), 30 Ch. D. 203, show that it is in each case a question simply of construing the will in order to ascertain the testator's intentions on the point. On the construction of the will in *Re Sykes*, the majority of the Court held that the option given by the will was not intended to be transmissible; accordingly, neither the donee's express assignees nor his personal representatives were entitled to exercise the option after his death. It would seem, however, that the dissenting judgment of Luxmoore, L.J., contained cogent arguments for construing that particular option as transmissible. That option was not a mere right to purchase the shares in question at something like their market value: it was a beneficial option, enabling the

donee to purchase, at their nominal value, shares which were in fact worth more than double that figure. Moreover, if (as the Court unanimously decided) there is no presumption that a testamentary option is intended to be personal to the donee, it is not easy to appreciate why the judgment of the majority of the Court appears to have stressed the point that the will did not state expressly that the option should be exercisable by the executors, administrators and assigns of the donee. Leave was given to appeal to the House of Lords.

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*Construction—residuary gift to trustees of parish church—failure for uncertainty.*—It is established law that a bequest to the vicar and churchwardens for the time being of a specified parish, without more, should ordinarily be construed as a charitable legacy to them for ecclesiastical purposes in the parish. Even a direction that the legacy is "to be applied by them in such manner as they shall in their sole discretion think fit" has been held merely to give them a discretion as to the distribution of the legacy among such ecclesiastical purposes. Such a legacy, therefore, being charitable, does not fail for uncertainty: see *Re Garrard*, [1907] 1 Ch. 382. In *Aston* v. *Wood* (1868), 6 Eq. 419, however, a bequest to the trustees of a certain chapel, "the money to be appropriated according to the statement appended", where in fact no such statement was appended, was held to fail on the ground that it was impossible to assume in such a case that the testator had intended to benefit charitable purposes only. A somewhat similar problem recently arose, before Simonds, J., in *Re Lawton, Lloyds Bank, Ltd.* v. *Longfleet St. Mary's Parochial Church Council*, [1940] W. N. 305. Here a testator had devised and bequeathed his residuary estate to the trustees for the time being of a certain parish church, to be used by them in their absolute discretion for any purpose or object permitted by the trust deed under which they operated. In fact there never had been any such trust deed, nor were there any trustees connected with the parish church. The learned Judge could find no general charitable intention in this attempted gift, and held, following *Aston* v. *Wood*, *supra*, that it was impossible for him to assume that any such trust deed, had there been one, would have included no non-charitable objects. The gift therefore failed for uncertainty.

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*Executor—assets include shares in a company—executor's right to registration as a shareholder.*—When a company has adopted,

as its articles of association, Table A in the First Schedule to the Companies (Consolidation) Act, 1908, a person who becomes entitled to a share therein in consequence of the death or bankruptcy of a member has (clause 22) "the right either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made". This right, which is conferred also by Table A (clause 21) in the First Schedule to the Companies Act, 1929, is subject in each case to the proviso that the directors of the company "have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy". In *Scott* v. *Frank F. Scott (London), Ltd.*, [1940] 1 Ch. 794, the question arose whether the sole executrix of a deceased registered shareholder, who had bequeathed to her his ordinary shares, had a right to be registered in respect of the shares. Here the company had adopted Table A in part only, expressly excluding (*inter alia*) the above clause. Nevertheless, the Court of Appeal held (i) that an unreported decision of its own, on the construction of similar articles in another company, bound it to construe the articles as conferring by implication upon the executrix a right to be registered in respect of the deceased's shares, and (ii) that on general principles, even apart from this, "where an executrix has the legal right to the shares of which the deceased testator was the registered holder she is, in the absence of any power of veto conferred on the company by its articles of association, entitled to have her name entered on the register if she so desires as ancillary to her legal title to the shares in question" (*ibid.*, p. 805). The dispute in the present case had arisen primarily on the question whether the articles (as had been intended originally when the company was formed) effectively gave the other shareholders the right to acquire at par the shares of a deceased member. As to this the Court held that the articles conferred no such right, and that there is no jurisdiction to rectify articles which fail to accord with the proved intentions of the signatories who were concerned in the formation of the company.

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## 4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax

practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

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*Transfer of assets—" resident or domiciled out of the United Kingdom "—domicil of company—Finance Act*, 1936, *s.* 18.—In order that the transfer of assets legislation may apply, there must have been a transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to a person " resident or domiciled out of the United Kingdom "—see the introductory words of section 18 of the Finance Act, 1936. How are the words " domiciled out of the United Kingdom " to be understood in relation to a body corporate? This question arose in *Gasque v. C. I. R.*, [1940] 1 K. B. 80. The company in question was a company incorporated by Act of the Royal Court, Guernsey. There is no English authority which conclusively decides how the domicil of a company is to be determined, but in the American Courts it has been laid down that " a corporation has its domicil in the jurisdiction of the State which created it, and, as a consequence, has no domicil anywhere else "—*Bergner & Engel Brewing Co.* v. *Dreyfus*, 70 Am. St. Rep. 251. In *Gasque's Case*, above, this view was adopted by Macnaghten, J., who held that, in the absence of evidence to the contrary, the law of Guernsey on the subject of the domicil of bodies corporate must be taken to be the same as the law of England, and that accordingly the company in question must be considered to be domiciled in Guernsey and was consequently a person domiciled out of the United Kingdom for the purposes of section 18 of the Finance Act, 1936. It follows that, irrespective of the residence of a body corporate, the fact of its being incorporated abroad will be sufficient to bring it within the words " resident or domiciled out of the United Kingdom ", at all events in any case in which the law of the place of incorporation on the subject of the domicil of bodies corporate cannot be shown to differ from the law of England.

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*Surtax—covenant to pay proportion of income—whether income includes sum apportioned under Finance Act*, 1922, *s.* 21.—*C. I. R.* v. *Payton*, 19 A. T. C. 271, illustrates the pit-falls which may be encountered in framing covenants designed to result in deductions from total income for surtax purposes. The respondent had covenanted to pay to trustees an annual sum equal to one-fourth of his income, " income " being defined in the deed as meaning

" the income of the settlor as computed for the purpose of the Income Tax Acts, . . . after deducting therefrom all [such] annual sums, annuities or interest, excluding the sum payable under this deed, as are allowed as deductions in computing the total income for the purpose of the said Acts ". The question to be decided was whether this definition brought in a sum apportioned to the settlor as a result of a direction under the companies surtax legislation. It was pointed out by Lawrence, J., that income so apportioned to the settlor is not, in fact, his income. The effect of the companies surtax legislation is that income apportioned to a member of a company is to be *deemed to be* his income, and by section 21 (2) of the Finance Act, 1922, the tax is to be assessed upon the member in the name of the company. The words in the deed, " the income of the settlor as computed for the purpose of the Income Tax Acts " could not be taken to refer to total income for surtax purposes, for, if so, there would be no point in the words " after deducting therefrom . . . as are allowed as deductions in computing the total income for the purpose of the said Acts ". Accordingly, the learned Judge held that the sum apportioned to the settlor was not " income of the settlor as computed for the purpose of the Income Tax Acts " within the definition of " income " in the deed.

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*Surtax—settlements—Finance Act*, 1938, *s.* 38 (1) *and Third Schedule, Part II.*—The provisions of the Finance Act, 1938, with regard to revocable settlements were considered in *C. I. R.* v. *Payne* and *C. I. R.* v. *Gunner*, 19 A. T. C. 224. In *Payne's Case* a settlor had covenanted to make certain annual payments to a company " during the remainder of his life or until an effective resolution shall be passed or an order made for the winding-up of the company, whichever shall be the shorter period ". The company was controlled by the settlor. It was held that the settlor's power to bring about the winding-up of the company carried with it a power to put an end to the covenant, and that this amounted to a power to " revoke or otherwise determine the settlement " within the meaning of section 38 (1) (a) of the 1938 Act. The second main point which was decided was common to *Payne's Case* and *Gunner's Case*. Paragraph 1 of Part II of the Third Schedule to the 1938 Act provides that, in the case of a settlement made before April 27, 1938, section 38 (1) of the Act shall not, by reason only of paragraph (a) of that subsection, apply to annual payments made under the settlement in 1937–38 or 1938–39, provided that certain conditions are satisfied.

Three alternatives are provided, of which the first (paragraph 1 (a)) is that " at the expiration of three months from the date of the passing of this Act—(i) no person has or can have any such power as is referred to in the said paragraph [*i.e.*, paragraph (a) of section 38 (1)]; and (ii) the settlor has not received, and is not entitled to receive, any consideration in respect of the release or disclaimer of any such power ". The question which arose in the cases under notice was, briefly stated, whether these requirements are fulfilled where the settlor has, within the three months' period, simply revoked the settlement. It was held by Lawrence, J., that in Part II of the Third Schedule, sub-paragraph (a) of paragraph 1 contemplates, and contemplates only, cases in which the settlement remains in being with the power of revocation eliminated, and is not satisfied by the mere revocation of the settlement, notwithstanding that, once the settlement has been revoked, it is literally true that " no person has or can have any such power as is referred to in " section 38 (1) (a). It was pointed out by the learned Judge that the case of complete revocation is dealt with separately in sub-paragraph (c), which makes the exemption conditional upon the coupling of revocation with the making of a new settlement fulfilling certain specified requirements. That being so it is impossible to read sub-paragraph (a) as making the exemption obtainable by the mere revocation of the settlement. So far as sub-paragraphs (a) and (c) are concerned, the choice is between the release of the power of revocation and the replacement of the original settlement by a new settlement fulfilling the prescribed conditions.

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*Surtax—annual payments—Finance Act*, 1922, *s.* 20 (1) (b).—Though paragraphs (a) and (c) of section 20 (1) of the Finance Act, 1922, have now been superseded by the relevant provisions of the 1938 Act and the 1936 Act respectively, there has been no supersession or repeal of paragraph (b), which deals with dispositions of income for a period which cannot exceed six years. The application of paragraph (b) was considered in *C. I. R.* v. *Black*, 19 A. T. C. 343, where the covenant in question provided for annual payments measured as to amount by reference to the excess (if any) of the annual letting value of certain property over the net annual income derived therefrom, the payments to cease on the happening of certain events and the aggregate amount of the payments to be limited to £100,000. The covenant was entered into in December, 1936. The annual payments were disallowed in the deduction of the covenantor's total income for surtax

purposes, and the matter came before the Special Commissioners on appeal. The appeal was heard in 1939. By this time the £100,000 limit had been reached and the payments had ceased. It was contended on behalf of the Crown that section 20 (1) (b) of the 1922 Act applied, since the period over which the payments extended did not in fact exceed six years and was nearer two. This contention was rejected by Lawrence, J., who pointed out that the period referred to in paragraph (b) is not a period which, in the events that happen, does not exceed six years, but is a period which, by virtue of the disposition, cannot exceed six years. The payments might have had to be continued over a period exceeding six years and paragraph (b) did not, therefore, apply. The learned Judge also rejected the contention that the annual amount allowable as a deduction must be limited, in any event, to one-seventh of £100,000. The disposition did not specify in figures the amount payable in each year, but only laid down the formula by reference to which the amount payable was to be measured. There was, therefore, no room for the application of the principle followed in *D'Ambrumenil* v. *C. I. R.*, [1940] 1 K. B. 850 (see *The Conveyancer*, June, 1940, at p. 447).

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"*Ordinarily resident.*"—See note under death duty cases (p. 158, *infra*) on "*Re Mackenzie*". The expression "ordinarily resident" had there to be construed in relation to a claim to exemption from estate duty, but the decision is worth noting for its bearing on the construction of the same expression in the Income Tax Acts.

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## 5. *DEATH DUTY CASES.*

By L. J. Stein, Barrister-at-Law.

*Exoneration from contribution to Estate Duty—power to appoint income up to stated annual amount—Finance Act*, 1894, *s.* 14 (1).—Section 14 (1) of the Finance Act, 1894, provides that, in the case of property which does not pass to the executor as such, the person who, being authorised or required so to do, has paid the estate duty in respect of the property may recover a rateable part of the duty so paid from the person entitled to any sum charged on the property, whether as capital or as an annuity or otherwise, under a disposition not containing any express provision to the contrary. In *Re Smith Bosanquet*, [1940] 3 A. E. R. 519, X had been given a life interest in his father's residuary estate,

with power to appoint, for the benefit of any widow whom he might leave him surviving, any part of the income of the residuary estate not exceeding in the whole the annual sum of £2,000. X died leaving a widow. By his will he appointed for her benefit an annual sum of £2,000, free of all deductions except income tax and surtax, to be payable out of the income of the residuary estate. The question before the Court was whether, the widow being exonerated by the words "free of all deductions" from a contribution, under section 14 (1), to the estate duty payable on her husband's death, it followed that the appointment was in excess of the power to appoint an annual sum not exceeding £2,000. Bennett, J., held that it was not. It was true that the words "free of all deductions" did absolve the widow from the liability which would otherwise have fallen upon her under section 14 (1); but what she got out of the income of the residuary estate was a sum not exceeding £2,000, and, that being so, it was immaterial that the appointment had been so made as to relieve her of her contribution to estate duty and to place an equivalent burden upon the fund from which the income arose.

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*Estate duty—gift of shares within three years of death—subsequent issue of bonus shares.*—The decision in *Att.-Gen.* v. *Oldham*, [1940] 1 K. B. 599 (see *The Conveyancer*, March, 1940, at p. 339), has been affirmed by the Court of Appeal ([1940] W. N. 269; [1940] 3 A. E. R. 450).

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*Tax-exempt securities—meaning of "ordinarily resident"—Finance (No. 2) Act*, 1915, *s.* 47.—By virtue of the Finance (No. 2) Act, 1915, certain Government securities are exempt from taxation so long as they are shown to be in the beneficial ownership of persons neither domiciled nor ordinarily resident in the United Kingdom. Further provision for the issue of tax-exempt securities is made in similar terms in section 22 (1) (b) of the Finance (No. 2) Act, 1931. The exemption extends to (*inter alia*) estate duty, and in relation to a claim to estate duty a question as to the meaning, in this context, of the expression "ordinarily resident" arose in *Re Mackenzie*, [1940] 4 A. E. R. 310. The deceased was born in Australia in 1857, came to the United Kingdom on what was meant to be a temporary visit in 1885, was certified insane a few months later, and was detained in institutions in the United Kingdom until her death in 1939. It was held that, though at the date of her death the deceased was domiciled in Australia, she was

ordinarily resident in the United Kingdom, and that she was none the less ordinarily resident because from the time she was certified until her death her presence in the United Kingdom was due to her being detained there against her will. In coming to this decision, Morton, J., referred to the decision on the words "ordinarily resident" in the Income Tax Acts in *C. I. R.* v. *Lysaght*, 13 T. C. 511, where Lord Buckmaster said that the element of choice is not conclusive in deciding whether residence is "ordinary" or not, and that "if residence be once established, 'ordinarily resident' means . . . no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life". A somewhat different note seems, at first sight, to be struck by Lord Sumner's observations in the same case that "the converse to 'ordinarily' is 'extraordinarily', and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'".

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*Estate duty—domicil.*—The question in *Re Sandys*, [1940] T. R. 379, was whether the deceased, who had an English domicil of origin, had acquired a domicil of choice in Moraco, and, if so, whether he had abandoned the domicil of choice, so as to cause the domicil of origin to revive. The case was decided by reference to its own particular facts, and it would serve no useful purpose to summarise the evidence, but the decision is worth noting as an addition to the line of cases illustrating the principle that where a change of domicil is said to have taken place, it is for the person asserting it to prove clearly both *factum* and *animus*.

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As in former editions the scope of Vol. I extends from Agreements to Licences and Water Rights, but the most noticeable difference is that all

contractions, the cause in the past of so many errors in copying by those not fully conversant with contractions or by those who are merely careless, have been done away with and every word is printed in full; this is all to the good and has not materially increased the length of the volume.

The general arrangement of the forms follows closely that of the former edition, but 117 new forms have been added in Vols. I and II. Many of these are included in Vol. I. Among the new notes and precedents in Vol. I a few may specially be noted, *viz.*: (1) an agreement by an employer with a servant of long standing to pay to the latter weekly sums, the effect of which is to diminish the employer's liability for surtax (*I. R. Commrs.* v. *Duke of Westminster*, [1936] A. C. 1); (2) an up-to-date hire-purchase agreement, but no reference is made in the notes to the Emergency Legislation such as the Courts (Emergency Powers) Act, 1939, and the Liability for War Damage (Miscellaneous Provisions) Act, 1939, s. 1, which clearly affect all hire-purchase agreements during the war; (3) a Deed of Rectification where by a mutual mistake the wrong plot was conveyed to a purchaser, a mortgagee joining in; (4) lease of a theatre or cinema with option to purchase; (5) a long and valuable note on the Coal Act, 1938, and the necessary alterations to the forms consequential thereto; (6) conveyance by the trustees of a Debenture Trust Deed; (7) conveyance on sale by a receiver for debenture-holders where there is no trust deed; and (8) conveyance upon sale in a debenture-holders' action. These are but a few selected at random of the many new forms in the book; the general revision both of the notes and cases is good and it is sad that Captain Overton has not lived to see the publication of the volume on which he and Mr. Simkins lavished so much care.

Clause No. 11 on p. 578, dealing with the reservation of a right to take water from a reservoir, must (having regard to the case of *Sir John B. Simeon, Bt.* v. *Isle of Wight Rural District Council*, [1937] 1 Ch. 527, whereby in effect it was held that a reservation of all the water on the land sold was held to be void) not be used without very careful consideration and possibly redrafting. The law as to the right to take water on the land of another is set out in an article in *The Conveyancer*, Vol. 2 (new series), pp. 203 *et seq.*, by Mr. F. S. Fiennes, and should be carefully studied.

We are sorry again to see the inclusion of a conveyance of freeholds by the personal representatives of a deceased tenant for life under the will of a testator who died before 1926, the settlement having come to an end, without any note that such a sale should never be made by such personal representatives except and solely for raising money for duties, etc.; it is part of the duties of such personal representatives to wind up the settlement, and when it is done it can usually be traced to the desire of their solicitor to grab all the costs he can. The rights of the personal representatives of a deceased tenant for life are very ably dealt with in an article in the *Solicitors' Journal*, Vol. 79, p. 243.

The index has been carefully prepared and the volume is a necessity for all practitioners.

D. C. L. C.